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Supreme Court, U.S.
FILED
SEP 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-567

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

vs.

CARL RAY SONGER,

Respondent.

CORRECTED COPY

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

I.

DOES THE EN BANC OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IN THIS CASE, WHICH ADDRESSES THE MERITS OF RESPONDENT'S SECOND FEDERAL HABEAS PETITION WITHOUT ADDRESSING THE SUCCESSIVE PETITION FINDINGS OF THE DISTRICT COURT, IGNORE PRINCIPLES OF FINALITY AND CONFLICT WITH THE GUIDELINES SET FORTH BY THIS COURT IN SANDERS V. UNITED STATES, 373 U.S. 1, 83 S.CT. 1068, 10 L.Ed.2d 148 (1963) AND IN RULE 9(b) OF THE RULES GOVERNING SECTION 2254 CASES?

II.

WHETHER THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS (EN BANC) IN THE INSTANT CASE HOLDING THAT RESPONDENT SHOULD RECEIVE A NEW SENTENCING HEARING BECAUSE THE TRIAL COURT FAILED TO CONSIDER NONSTATUTORY MITIGATING EVIDENCE, WHICH IS BASED ON AND MISCONSTRUES CERTAIN COMMENTS OF THE TRIAL JUDGE, IS IN CONFLICT WITH FAYERWEATHER V. RITCH, 195 U.S. 276, 25 S.Ct. 58 , 49 L.Ed.2d 193 (1904) WHICH PRECLUDES THE USE OF EVIDENCE OF A TRIAL JUDGE'S THOUGHT PROCESS TO IMPEACH A JUDGMENT?

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I.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit issued an opinion on August 16, 1985, granting respondent a new sentencing hearing. This opinion appears in the appendix as A 1 - 39. The 11th Circuit panel which heard Songer v. Wainwright, Case No. 85-3064 entered an order on February 5, 1985 staying respondent's execution. This order appears in the appendix as "A 46 - 50". The order and opinion of the district court on the second habeas petition appears as "A 63 - 86". The order and opinion of the Florida Supreme Court on the successive motion under Rule 3.850, Fla.R. Crim.P., appears in the appendix as "A 87 - 93".

The order of the trial court denying

respondent's second 3.850 motion appears in the appendix at A 94 - 112.

II.

JURISDICTIONAL STATEMENT

The Eleventh Circuit Court of Appeals (en banc)(hereinafter called the 11th Circuit) on August 16, 1985 rendered an opinion reversing the district court's denial of relief on respondent's second federal habeas petition. This Court has jurisdiction to hear this cause pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Sections 1 and 2 of the Constitution of the United States provide:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The

> Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. §1254 (1) provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon a petition of any party

> to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §2101(c) provides:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

IV.

STATEMENT OF THE CASE

On August 16, 1985, the Eleventh Circuit Court of Appeals granted respondent habeas relief on his second habeas corpus petition. The court granted relief based on some post-decision comments made by the trial judge which the 11th Circuit interpreted to mean the trial judge did not consider non-statutory mitigating

evidence. See the court's opinion which appears in the appendix as A 1 - 39.

Respondent was scheduled to be executed at 7:00 a.m. on Tuesday, February 5, 1985. The lower federal court entered a stay of execution on the issue of whether counsel's or the court's understanding of the scope of mitigating evidence which could be presented at a capital sentencing trial operated to violate Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See Songer v. Wainwright 756 F.2d 800 (11th Cir. 1985).

The death sentence was imposed in this case on February 27, 1974 after Respondent was found guilty of the first degree murder of a highway patrolman. The Florida Supreme Court affirmed the judgment and sentence. Songer v. State, 322 So.2d 481 (Fla. 1975) (Songer I). The

United States Supreme Court vacated the death sentence and remanded for reconsideration in light of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). See Songer v. Florida, 430 U.S. 952 (1977).

On remand it was determined there had been no Gardner violation, and a death sentence was reimposed. In again imposing the death sentence, the trial judge specifically stated he had considered all of the evidence presented at the original sentencing hearing. The Florida Supreme Court on rehearing addressed the Florida death penalty statute in terms of Lockett v. Ohio, supra. See Songer v. State, 365 So.2d 696 (Fla. 1978) (Songer II). Certiorari to this Court was denied. Songer v. Florida, 441 U.S. 956 (1979).

In September, 1980 Respondent's first

death warrant was signed and he filed a motion pursuant to Rule 3.850, Fla. R. Crim. P., alleging a fusillade of issues. That motion included, inter alia, the following issues: (1) The trial court improperly limited the jury's consideration of mitigating circumstances; (2) Defendant received ineffective assistance of counsel at the penalty stage of his trial; (3) The Florida death penalty statute is unconstitutional and denies due process of law on its face and as applied because no standard of proof is required for the overall weighing process in determining whether the death sentence is appropriate. After hearing, the trial court denied relief and the Florida Supreme Court affirmed in Songer III. Songer v. State, 419 So.2d 1044 (Fla. 1982).

A second warrant was signed in November, 1982. Respondent filed a state habeas corpus petition alleging ineffective assistance of appellate counsel. Relief was denied by the court in Songer v. Wainwright, 423 So.2d 355 (Fla. 1982) (Songer IV). A federal habeas corpus petition was filed wherein Respondent raised the same issues being urged in his second habeas petition concerning ineffective assistance of counsel, limitation on mitigating evidence and the jury instructions during the penalty phase.

Another evidentiary hearing was held in the federal district court. Thereafter the district judge entered a lengthy opinion addressing the aspects of Respondent's claims that he now wants to be reconsidered. The district judge denied habeas relief, and the Eleventh Circuit affirmed

that denial. See Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983) and Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984). A petition for certiorari to this Court on the same issues was denied on January 7, 1985. Songer v. Wainwright, 83 L.Ed.2d 809 (1985).

Respondent's third death warrant was signed on January 10, 1985. A second 3.850 motion was filed in the trial court on January 24, 1985 alleging:

1. Unconstitutional limitation on mitigating evidence.

2. Ineffective assistance of trial counsel.

3. Sentencing charge on mitigating circumstances violated Eighth and Fourteenth Amendments.

4. Instruction on function of the sentencing hearing.

A hearing was held in the Circuit Court of the Fifth Judicial Circuit in and for Citrus County, Florida, Honorable John W. Booth presiding, on January 25, 1985. Songer proffered the testimony of juror Lisa Crews. Trial counsel, C. John Coniglio, collateral counsel, Joseph Jordan, and Songer were permitted to testify. Songer was allowed to amend the motion to allege a fifth ground, to wit: that having been an inmate of death row for eleven years and being on death watch three times constituted cruel and unusual punishment. During the course of the hearing, the trial judge made comments from the bench concerning Florida's death statute in 1974 and how the jury could have interpreted the instructions. (A 254 - 256)

On January 28, 1985, the trial court entered an order indicating the issues had

been previously raised and disposed of in the state and federal courts. The Florida Supreme Court affirmed. Songer v. State, 463 So.2d 229 (Fla. 1985)

On January 31, 1985 a second federal habeas petition was filed in the United States District Court for the Middle District of Florida. The district judge entered an opinion and order on February 2, 1985 denying relief and stating this was a successive petition under Rule 9(b), Rules Governing Section 2254 Cases. Songer v. Wainwright, 605 F.Supp. 686 (M.D. Fla. 1985).

The appeal to the 11th Circuit was assigned to a different three-judge panel from the one which had heard the original habeas petition. The original panel had heard and denied on January 29, 1985, a motion to recall the mandate on the first

appeal and motion to stay execution. Respondent filed an application for a rehearing en banc on the denial of the motion to recall the mandate and for stay of execution. The en banc court indicated the matter of a stay was mooted and action on recall of the mandate was not necessary because of the order entered by the panel on appeal from denial of the second habeas petition. See Songer v. Wainwright, 756 F.2d 799 (11th Cir. 1985).

The panel on the second habeas petition stayed respondent's execution and requested a polling of the en banc court; en banc review was granted on March 20, 1985. Songer v. Wainwright, 756 F.2d 1482 (11th Cir. 1985).

By order dated April 9, 1985, the court decided to hear the original habeas appeal en banc. The original panel

opinion and the panel's order of January 29, 1985 were vacated. Songer v. Wainwright, 758 F.2d 552 (11th Cir. 1985). This original opinion and order were reinstated by the en banc court on August 16, 1985. However, the court reversed the district court's decision denying habeas relief on the second appeal and ordered the district court to issue the writ.

The State seeks certiorari review of the 11th Circuit opinion entered on August 16, 1985 which requires a resentencing of respondent.

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254.

REASONS FOR GRANTING THE WRIT

A.

THE OPINION BELOW, WHICH CONSIDERS AND REACHES THE MERITS OF RESPONDENT'S SECOND FEDERAL HABEAS PETITION, IGNORES THE DOCTRINES OF FINALITY AND SUCCESSIVE PETITIONS AND CONFLICTS WITH THIS COURT'S DECISION IN SANDERS V. UNITED STATES, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

In this case, the 11th Circuit reached the merits of respondent's second habeas petition. The district court denied habeas relief stating the petition was successive under Rule 9(b), Rules Governing Section 2254 Cases. The parties both addressed in their briefs and argued before the court the successive petition issue. Respondent had conceded the legal components and factual basis of his argument on limitation of non-statutory mitigating evidence had been previously presented. Yet, the 11th Circuit in one

sentence ignores the facts before it and says, without explanation, the petition raises different grounds for relief. This action by the court conflicts with the guidelines on successive petitions as set out by this Court in Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

Rule 9(b) of the Rules Governing Section 2254 Cases provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This rule is a codification of the principles announced in Sanders. This Court said controlling weight should be given to

a prior denial of habeas relief where the same grounds were presented and determined on the merits in a prior application, and the ends of justice would not be served by reaching the merits of the new petition.

Respondent in his motion to recall the mandate which had issued on appeal from the denial of the first federal habeas petition conceded, "All of the legal components and all of the factual basis of the claim have been presented." The district court proceeded to analyze respondent's second petition with Sanders and its progeny in mind. That court made findings of fact which supported its conclusions that the second habeas petition was successive and the ends of justice did not require a redetermination of the issues. See Songer v. Wainwright, 605 F.Supp. 686 (M.D. Fla. 1985).

This Court in Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) indicated the standard to be applied by a court of appeals to findings of fact by the district court is the clearly erroneous standard. The district court findings should not be set aside unless clearly erroneous. Accord, Rule 52(a), Federal Rules of Civil Procedure. Yet, the 11th Circuit in this case completely overlooked these findings. The court set aside the district court findings without explaining why they were clearly erroneous.

The circuit court's assertion that the second petition raises a different ground for relief is belied by the record. At most what the second petition contains is additional facts on the same issues. Even under such a set of circumstances,

the 11th Circuit has held that defendants are not entitled to relitigate their claims. See e.g., Shriner v. Wainwright, 735 F.2d 1236, 1239 (11th Cir. 1984) and Smith v. Kemp, 715 F.2d 1459, 1468 (11th Cir. 1983). Thus, the lower court has not only failed to consider the precedent of this Court but also its own precedents.

In both Woodard v. Hutchins, __ U.S. __, 104 S.Ct. __, 78 L.Ed.2d 541 (1984) and Barefoot v. Estelle, __ U.S. __, 103 S.Ct. __, 77 L.Ed.2d 1090 (1983), this Court recognized the problems associated with successive petitions. This court also indicated the federal courts should not tolerate repetitious petitions in response to the setting of execution dates in death cases. It has become a standard procedure in the death penalty area to file a successive habeas petition on any "new" issue

pending in the federal courts.

But the problems inherent in successive petitions are not unique and troublesome in the death area only. Recently, the Second Circuit addressed a successive petition which did not involve the death penalty. Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984). The circuit court in Wilson granted relief on a successive petition. The state sought certiorari relief on the questions, inter alia, of finality of litigation and successive habeas petitions. On June 24, 1985 certiorari review was granted by this Court. See Henderson v. Wilson, 87 L.Ed.2d 630 (1985).

Petitioner respectfully submits certiorari review should be granted in this case to lend guidance to the lower federal courts on the proper application of Rule 9(b) and Sanders v. United States, supra,

in death cases. The second federal habeas petition has become the norm in death litigation. See e.g., Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984) and Adams v. Wainwright, 734 F.2d 511 (11th Cir. 1984).

The state courts, and the federal district courts in the eleventh circuit are as perplexed as the lay citizenry. When will litigation in any case be considered final? When and under what circumstances will the federal appeals court apply the doctrines of successive petition or abuse of the writ? Is it now the law that a state prisoner may seek habeas relief on the same issue until he reaches a sympathetic ear?

B.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS (EN BANC) IN THE INSTANT CASE HOLDING THAT RESPONDENT SHOULD RECEIVE A NEW SENTENCING HEARING DUE TO THE TRIAL JUDGE'S ALLEGED FAILURE TO CONSIDER NON-STATUTORY MITIGATING EVIDENCE CONFLICTS DIRECTLY WITH FAYERWEATHER V. RITCH, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904) AND IS BASED ON AN ERRONEOUS FACTUAL PREMISE.

In Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1983), reversed on other grounds, __ U.S. __, 104 S.Ct. __, 80 L.Ed.2d 674 (1984) the Eleventh Circuit Court of Appeals held:

> "It is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision . . .
>
> There are several strong policy reasons that counsel continued adherence to this rule. First, such testimony poses special risks of inaccuracy. The testimony is often given several years after the fact and a judge is unlikely to be able to reconstruct his thought processes accurately over such a span of

> time. Second, the finality and integrity of judgments would be threatened by a rule that enabled parties to attack a judgment by probing the mental processes of a judge." Id. at 1263.

Accord: Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982) cert. den. __ U.S. __, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); United States v. Crouch, 566 F.2d 1311 (5th Cir. 1978).

Notwithstanding the foregoing "firmly established rule," the Eleventh Circuit, sitting en banc in the case at bar, has granted habeas corpus relief based on statements of the trial judge made in a state collateral proceeding eleven years after respondent's trial.

This Court in Fayerweather v. Ritch, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904) declared:

> A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.
>
> Id. at 49 L.Ed. 213

The action of the Eleventh Circuit in the instant case flies directly in the fact of Fayerweather. It is noteworthy that the Court of Appeals was more than willing to apply Fayerweather to exclude judicial testimomony which the state sought to offer in Proffitt and Strickland to support the state judgment and sentence. Now, when the judicial evidence in question arguably casts doubt on the validity of the sentence, the Court of Appeals has chosen to rely on it.

The comments of the trial judge, John W. Booth, are appended to this petition at A 254 - 256. Petitioner would urge this

Court to examine them closely, as contrary to the Court of Appeals opinion, the trial judge does not state that he failed to consider non-statutory mitigating evidence when sentencing Songer. In fact, at Songer's re-sentencing following the Gardner remand, the trial judge made it abundantly clear that he had considered the entire record.
(A 229, 248) Further, where, as here, the record does not reflect the standard applied by the trial judge, he is presumed to have applied the correct one. See e.g., Wainwright v. Witt, 469 U.S. __, 105 S.Ct. ____, 83 L.Ed.2d 841 (1985). The Court of Appeals must not be permitted to bend the record facts to suit its own purposes.

More importantly, regardless of the trial court's interpretation of the statute, this matter has been fully reviewed

by the Florida Supreme Court. One must assume that the Florida Supreme Court, in performing its function of reviewing the entire record, properly applied Florida's death penalty statute and considered all mitigating evidence.[1] This Court was confronted with a similar situation in Wainwright v. Goode, __ U.S. __, 104 S.Ct. __, 78 L.Ed.2d 187 (1983) and held:

> Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no scund basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Id. at 78 L.Ed.2d 194.

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[1] It is important to recall that no mitigating evidence was excluded by the trial court at Songer's sentencing hearing.

See also Barclay v. Florida, __ U.S. __, 103 S.Ct. __, 77 L.Ed.2d 1134 (1983).

If the appellate process is to have any meaning to the bar and the public, there must be confidence that the court of appeals will consistently apply its own precedents and those of this Court. This Court should grant certiorari and resolve the confusion created by the Eleventh Circuit's refusal to follow not only Fayerweather and Goode, but its own cases, Proffitt and Washington.

CONCLUSION

The decision of the Eleventh Circuit in this case clearly ignores this Court's rulings in both Fayerweather v. Ritch, supra, and Sanders v. United States, supra; therefore, certiorari review should be granted and the decision of the 11th Circuit should be summarily reversed with instructions to reinstate the opinion of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PEGGY A. QUINCE, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on 21st day of October 1985, I served three copies of the Petition for Writ of Certiorari on Deval L. Patrick, 99 Hudson Street, New York, New York 10013, by a duly addressed envelope with postage prepaid.

Peggy A. Quince
Assistant Attorney General

85-567

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SEP 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

Louie L. Wainwright, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

vs.

Carl Ray Songer,

Respondent.

On Petition for Writ of Certiorari
To the United States
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For the Eleventh Circuit

APPENDIX OF PETITIONER ON JURISDICTION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3064

CARL RAY SONGER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
RICHARD DUGGER, Superintendent,
Florida State Prison,
Starke, Florida,

Respondents-Appellees.

Appeal from the
United States District Court
For the Middle District of Florida

(August 16, 1985)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

PER CURIAM:

---

*Judge Joseph W. Hatchett recused himself and did not participate in this decision.

After an extensive history of direct and collateral review on a variety of issues, this case comes before us after the denial by the district court of petitioner's second federal habeas petition as successive. See Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b). This case was voted en banc on a motion of the panel that heard and granted petitioner's motion for stay of execution. Finding that this petition does allege and that this record does establish new and different grounds for relief and that petitioner could not have presented such in the prior proceeding, we **VACATE** the judgment of the district court and **REMAND** with instructions to grant the writ in accordance with this opinion.

During proceedings held in late

January, 1985, the state trial judge made statements, for the first time, indicating that he interpreted Florida Statute §921.141(7) at the time of petitioner's trial as limiting consideration of mitigating evidence to those "enumerated items." This was followed by statements reflecting that in sentencing petitioner he thus did not give consideration to any evidence dealing with nonstatutory mitigation. This violates the dictates of Eddings v. Oklahoma, 455 U.S. 104, 113 - 114 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978). At the same hearing on petitioner's second state 3.850 motion, that court also indicated that Lockett had never been held explicitly retroactive in its application. There is no doubt today about this question. Lockett is retroactive, see e.g., Eddings v. Oklahoma, 455 U.S. 104, 118

(1982); Jordan v.Arizona, 438 U.S. 911 (1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981).

The fact that the Florida Supreme Court has now held that neither the wording of the Florida Statute nor its prior decisions precluded the introduction of nonstatutory mitigating evidence, State v. Songer, 464 So.2d 229 (Fla. 1985), relying on State v. Songer, 365 So.2d 696 (Fla. 1978), is not controlling in the instant matter. That court has recognized that the law could have been so "misconstrued." See Perry v. State, 395 So.2d 170, 174 (Fla. 1981); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). The critical and dispositive fact here is that the state trial judge did misinterpret the law and thus failed to consider any nonstatutory mitigation at the time of imposing the sentence of death. Although that sentence

was vacated, Songer v. Florida, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977), due to a Gardner violation, upon resentencing the state trial judge limited petitioner to reviewing and rebutting the presentence investigation report. Consequently, it is clear that the state sentencing judge refused to given any consideration to non-statutory mitigating evidence at either the first or second sentencing proceedings. The interests of justice require that this be corrected.

The district court's denial of the writ of habeas corpus relief is reversed as to the death penalty. The petitioner is entitled to a new sentencing hearing by the sentencing judge at which he should be allowed to introduce any and all evidence in mitigation of the reimposition of a sentence of death. As discussed above,

the state sentencing judge should then consider all relevant evidence in the total record and sentence petitioner in accordance with Florida law.[1]

The case is **REMANDED** to the district court for the entry of an appropriate writ. The clerk is instructed to issue the mandate immediately and simultaneously with the mandate in case number 83-3500.

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[1] Petitioner is entitled to be resentenced. Florida's procedure in capital cases provides in the first instance an advisory recommendation by the trial jury. Although we have held that there was no constitutional infirmity in the jury proceedings in the original sentencing process, we leave to the state trial judge's discretion the issue of whether or not another jury should be impaneled to assist him in arriving at an appropriate sentence.

CLARK, Circuit Judge, concurring in part and dissentin in part, in which KRAVITCH, JOHNSON and ANDERSON, Circuit Judges join:

I concur in the majority's decision that the state trial judge's decision to limit consideration of mitigating evidence to the specifically enumerated mitigating circumstances violated the dictates of Eddings v. Oklahoma, 455 U.S. 104, 113 - 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 438 U.S 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, I cannot agree with the majority's conclusion that "there was no constitutional infirmity in the jury proceedings in the original sentencing process. . . . " Majority Opinion at 4, n.1. This conclusion ignores the reality of the state of mind of the prosecutor, the defense counsel, the trial judge and the jury with respect to the meaning of the Florida

death penalty statute at the time of Songer's capital sentencing proceeding in 1974. The effect of their combined perception resulted not only, as the majority acknowledges, in the trial judge's failure to consider non-statutory mitigating evidence, but also in counsel's failure to develop or present non-statutory mitigating evidence and instructions that prevented the jury from considering such evidence.

Because state law operated to restrict the consideratin of mitigating evidence by both the sentencing judge and the advisory jury in this case, the death sentence should not be reimposed unless the jury is allowed to perform its critical role in the sentencing process[1]

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[1] The jury plays an indispensable role in the sentencing process established by Florida. After testing the sufficiency

consistent with the dictates of the Eighth Amendment. Accordingly, I respectfully dissent from the majority opinion.

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of the statutory aggravating circumstances and weighing all statutory aggravating evidence against the relevant mitigating evidence, the jury returns a recommendation of either life imprisonment or the death penalty. Fla. Stat. §921.141(2) (1985). A recommendation of life may only be overturned if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Although Florida is not constitutionally obligated to make a jury the sentencing authority in capital cases, Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Supreme Court's recent decision in Baldwin v. Alabama, 53 U.S.L.W. 4759 (June 17, 1985) (holding that under the Alabama death penalty statute, because the judge did not consider the jury's recommendation, the statute which forced the jury to sentence the defendant to death whenever aggravating circumstance existed was not unconstitutional), indicates that a state's greater power to exclude a jury from capital sentencing altogether does not include the lesser power to assign to the jury any role imaginable. The Court

I. The Jury Proceeding at the Penalty Phase of Songer's Trial

A. Mitigating Evidence not Presented to the Jury

At the sentencing hearing, one of the first under the then new Florida

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stated that the Constitution might prohibit a sentencing judge from considering a jury verdict reached in contravention of the Constitution if "the judge actually were required to consider the jury's 'sentence' as a recommendation as to the sentence the jury believed would be appropriate, . . . and if the judge were obligated to accord some deference to it. 53 U.S.L.W. at 4761 (citation omitted).

The fair and consistent administration of the Florida sentencing scheme required by the Eighth Amendment prevents Florida from depriving the defendant of a properly individualized determination of the sentence by the jury if that jury has been asked to recommend a sentence that it considers appropriate and the sentence ultimately imposed depends to any significant degree on the jury's recommendation. Therefore, any restriction of mitigating evidence presented to or considered by the jury, a "sentencer" under Florida law within the meaning of Eddings v. Oklahoms, supra, would be a violation of Lockett v. Ohio, supra.

statute, Songer was the sole witness in his own behalf. He answered several questions about his drug use and the non-violent nature of his previous crimes, but defense counsel presented no evidence other than this testimony. There was available, at the time, expert testimony that could have explained the influence of Songer's drug addiction, along with lay testimony confirming the effects of drug use upon the petitioner. The questions regarding prior crimes never touched on Songer's prospects for rehabilitation, a fact that could have been placed into evidence through an existing Texas parole report which described Songer as non-violent and a good candidate for rehabilitation.

Furthermore, none of the evidence at sentencing related to Songer's character despite the fact that many family members

were present at trial to testify for him. Songer's wife could have testified about his usually passive temperament and the fact that he had a two-year-old son. His parents were present and could have described his childhhod and general character. Several uncles and cousins were available for testimony about such matters as Songer's training in brickmasonry and carpentry. One of his uncles worked as a highway patrolman, the same occupation as the victim.

B. The Reasons for the Omission

These omissions were not the product of a tactical choice by Songer's counsel, as held by the federal district court on the first petition.[2] Rather, the

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[2]The district court never reached the merits of the second habeas petition now before us because it ruled that each of the claims raised in the petition had

omissions were a result of the perception of Florida law shared by Songer's counsel and the trial judge. The statements made

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already been ruled upon and that he ends of justice would not be met by reconsideration of the claims. It therefore dismissed the petition under Rule 9(b) of the rules governing section 2254 cases. This rule codifies the standard announced in Sanders v. United States, 373 U.S. 1, 16-17, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). There are two branches to this doctrine: the first one applies to successive petitions that allege no new grounds for relief, while the second applies to successive petitons that allege new grounds that might have been alleged in a prior petition. Under the first branch, the district court has discretion to dismiss the petition if (1) the prior petition was adjudicated on the merits and (2) the ends of justice would not be served by considering the merits again in the subsequent petition.

The issue of the effect of state law on defense counsel's presentation at sentencing was raised in section 14 C of Songer's first petition. Yet the district court presumed (without finding) that the failure to present the mitigating evidence was the product of a tactical choice and, while noting the attorney's reasonable but mistakenly restrictive interpretation of the statute, the court did not consider whether that circumstance alone

by the trial judge, contained in the opinion referred to by the majority, do not even suggest that he concluded that consideration of statutory mitigating

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could form a basis for relief. 571 F.Supp. 1384, 1394 - 95. This issue, therefore, was never adjudicated on the merits.

The issue of restrictive jury instructions was raised in the first petition and addressed on the merits, meaning that the claim may be heard now only if reconsideration serves the ends of justice. The plainly erroneous disposition of this claim in the prior petition provides a persuasive reason to allow reconsideration at this time. See Bass v. Wainwright, 674 F.2d 1204, 1207 (11th Cir. 1982). The panel opinion rejected the claim on the basis of Ford v. Strickland, 696 F.2d 804, 812 (11th Cir.), cert. denied, __ U.S. __, 104 S.Ct. 201 (1983). Yet the Ford decision involved jury instructions based exclusively on the statute, while the instructions in Songer's case restricted the jury further through the verdict form. See section III, infra. The panel opinion also incorrectly states that Songer does not allege cause and prejudice for his failure to object to the jury instructions. Songer claims that state law at the time restricted the use of mitigating evidence (thus alleging cause) and that

circumstances was limited to the court's sentencing function. Rather he indicated that prior to trial he studied the statute and determined that non-statutory mitigating evidence was not to be considered by the jury.[3] He stated that he thought the "Penalty Proceeding Jury Instructions

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the jury probably would have changed its verdict if it had heard the substantial mitigating evidence he would have presented (thus alleging prejudice). Moreover, the state did not invoke a procedural bar on this claim.

The ends of justice would also be served by hearing this claim because it is inextricably intertwined with the claim discussed above that has not yet received a ruling on the merits, and is critical to a full understanding of that claim.

[3]The judge stated:

> Therefore, the undersigned determined that the Penalty Proceeding Jury Instructions should "track the statute"(Chapter 72 - 724, Laws of Florida) and limited the aggravating circumstances to those enumerated by that

should 'track the statute' . . . ." Mem. op. at 5 (Fla. Cir. Ct. Jan. 27, 1985). He then went on to say, "[t]he evidence and testimony proffered at the Post-Conviction hearing indicated there was evidence at the time of the Songer trial that could be presented as mitigating circumstances under present case and statutory law . . . . " Mem. op. at 6.

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statute; and placed the normally mandatory connotation on the word "shall" in all places where such word was used in such statute, subject to the following provision of that statue, to-wit:

(1) " . . . In the proceeding, evidence may be presented as to any matter that the court deems relevant [sic] to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the

The only reasonable conclusion that can be drawn from this is that not only did the trial judge restrict his consideration in sentencing to only statutory mitigating circumstances but that had Songer's counsel proffered non-statutory mitigating evidence for jury consideration, he would not have admitted it. His opinion states as much. Furthermore, the instruction given to the jury by his own admission ws intended to limit their consideration to only the mitigating

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court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that he defendant is accorded a fair opportunity to rebut any hearsay statements; . . . The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death". (Above underlining by the Court)

circumstances enumerated in the statute. The instruction given at the penalty phase of Songer's trial stated "[m]itigating circumstances by statute are," then listed the items contained in Fla. Stat. Ann. §921.141 (1975).

The verdict forms given to the jury to sign when it reached its conclusion as to the appropriate penalty are also illuminating. The two forms, one if the jury recommended life, the other if the jury recommended the death penalty read:

> We, the Jury, having heard the evidence under the sentencing procedure in the above case, as to whether aggravating circumstances which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances as defined in the Court's charges to outweigh such aggravating circumstances, do find and advise that the mitigating circumstances do outweigh the

> aggravating circumstances. We therefore advise the Court that a life sentence should be imposed herein upon the defendant by the Court, dated this blank day of blank, 1974, and a place for the foreman to sign. (emphasis added).
>
> We, the Jury, having heard evidence under the sentencing procedure in the above case, as to whether aggravating circumstances which are so defined in the Court's charge, existed in the capital offense here involved and whether sufficient mitigating circumstances as defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the aggravating circumstances do outweigh the mitigating circumstances. We therefore advise the Court that a death sentence should be imposed herein upon the defendant by the Court, dated this blank day of blank, 1974, and a place for the foreman to sign. (emphasis added).

In addition to the trial judge's statements regarding what he believed the law to be regarding mitigating evidence at the time, as well as the instructions he gave and the verdict forms he utilized, we

have Songer's counsel's testimony. He testified at a state post-conviction evidentiary hearing that he had not offered character or other mitigating evidence because he believed at the time that only evidence relevant to the statutory mitigating circumstances was admissible. He stated:

> The only recollection that I have is that the statute was new at that time, . . . going over the statutory grounds with him for aggravating circumstances and mitigating circumstances, and what would be available to us under the statutory language and what would be against us under the statutory language . . . . [I examined] all the factors we had available to us. R.II, at 379. (footnote omitted).4

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4 He also subsequently gave an affidavit in which he stated in pertinent part:

> 8. That at the time of the defendant's sentencing hearing,

The district court in Songer's first federal habeas petition, in determining

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> Florida Statute 921.141 was relatively new. Your affiant in construing said statute reasonably believed that it precluded the consideration of any evidence except the statutorily enumerated mitigating circumstances.
>
> 9. Further, it was your affiant's belief that any evidence outside the scope of the statutory enumerated circumstances was irrelevant, immaterial and patently inadmissible.
>
> 10. Your affiant verily believes that this was the construction ascribed to the statute by the prosecution as well as the Honorable John Booth, Circuit Judge presiding at the trial.
>
> 11. That as a result of the statute, and the construction which your affiant applied, your affiant offered only brief testimony by the defendant regarding his history of criminal activity (T-429), his history of violent crimes (T-429), and his mental and/or emotional condition (T-429). The direct testimony took less than two (2)

that trial counsel Coniglio was not

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minutes and comprises approximately two (2) pages of the trial transcript (T-429), T-430, T-431). The total mitigating testimony, including direct and cross examination, took approximately five (5) minutes. The brevity of the defendant's presentation was a direct consequence of the fact that at the time of trial, the undersigned reasonably believed that mitigation was limited to that provided by statute.

12. The undersigned had access to a variety of other mitigating evidence which was not offered, nor investigated, because of the undersigned's reasonable belief regarding the limitation. Had your affiant known or had reason to know that other evidence could have been offered, your affiant would have offered same, including but not limited to:

(a) psychological testimony regarding the effects of drug abuse on the defendant's state of mind.

(b) testimony from the defendant's family regarding his upbringing and his association with his family.

ineffective, concluded, "it is quite

(c) testimony from friends and associates regarding the defendant's pertinent character traits.

(d) testimony and/or evidence regarding the defendant's likelihood for rehabilitation.

(e) testimony from former teachers and clergy regarding pertinent character traits.

(f) a Texas parole report of 1969, including testimony from correctional personnel as to the defendant's adjustment, attitude, and likelihood for rehabilitation while incarcerated.

13. Your affiant would have investigated and offered any and all conceivable mitigating evidence had your affiant known such was admissible.

14. Throughout the pendency of these proceedings, your affiant had little or no contact with the defendant's parents, inasmuch as the parents had no actual knowledge of the charged

possible that [Coniglio] may have been

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offenses and inasmuch as the construction ascribed to the statute indicated they had absolutely no relevant material or admissible information.

15. Further, your affiant had no knowledge of the existence of a handwritten letter from the defendant's father, postmarked the 4th day of February, 1974, addressed to Michael Kovack, Assistant Public Defender, and as a result of the above, made no attempt to utilze the defendant's parents' assistance in preparing the defendant's cause for either the guilt or penalty phase of the proceedings.

16. It is your affiant's recollection that Florida's death penalty statute was relatively new and there were few, if any, authorities upon which to rely in the preparation of the penalty phase of the proceedings.

17. It is your affiant's belief, based upon recollection of the proceedings and the instructions given to the jury, that the jury likewise believed that they were limited in their consideration to the mitigating

laboring under the reasonable, but mistaken, belief that he could not introduce any nonstatutory factors." Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983)[5]

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circumstances as defined in the Court's charges.

18. At the defendant's resentencing held on the 17th day of August, 1977, the undersigned on behalf of the defendant asserted his right to another sentencing proceeding at which time the undersigned would have offered additional mitigating evidence, but was precluded from doing so, as the Court ruled that the hearing was limited to the Gardner v. State violation.

[5] Apparently, the district court believed this "reasonable belief was mistaken" because Florida law did not, in fact, prevent the introduction of nonstatutory mitigating evidence at the penalty phase of a capital trial. However, in light of the trial judge's statements as well as the discussion infra., it seems apparent that Coniglio's opinion of the law was not only reasonable but accurate.

Of course, neither the state trial judge's nor Songer's counsel's construction of the Florida statute was unfounded. quite the contrary, theirs was the most reasonable interpretation of Florida law at the time. The new Florida death penalty statute was passed and became effective in December of 1972, shortly after the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The wording of the statute itself is logically interpreted consistently with their view; at least, the statute is very ambiguous.[6] The

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[6] The statute required the advisory jury, in arriving at its advisory sentence, to consider:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

Florida Supreme Court's subsequent rulings verified their conclusions.

> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7) which outweigh the aggravating circumstandes found to exist, and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

Fla. Stat. §921.141(2) (1975) (emphasis supplied). The task of the sentencing judge is described in parallel terms, referring to mitigating circumstances "as enumerated."

These two subsections indicate that the jury and judge should only consider mitigating circumstances listed in the statute. The enumeration of mitigating and aggravating circumstances in subsections (6) and (7), however, leaves the meaning of the statute ambiguous. Subsection (6) (now renumbered as subsection (5)) provides that "aggravating circumstances shall be limited to the following [categories]." (emphasis supplied). Subsection (7) (currently numbered as subsection (6)) provides that "mitigating circumstances shall be the following: [list of categories]." The difference between "shall be" and "shall be limited to" could

The Florida Supreme Court first construed the statute in State v. Dixon, 283 So.2d 1 (Fla. 1973).[7] That court in describing the statute stated:

> The Legislature has, . . . provided a system whereby the possible aggravating and mitigating circumstnaces are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges.
>
> 283 So.2d at 7

Later in the opinion the court reasoned:

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be read to mean that the statutory list of aggravating circumstances was exclusive while the list of mitigating circumstances was not. It could mean that mitigating circumstances "shall be" the enumerated ones along with others. Yet this reading would appear to conflict with the as enumerated language in the statute.

[7] Songer's trial was in 1974. Dixon was decided in 1973 but was not in published form at the time of Songer's trial and did not influence the trial court or any of the attorneys.

> The most important safeguard presented in Fla. Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed.
>
> 283 So.2d at 8

Finally, before discussing each mitigating circumstance enumerated in the statute, the court said:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstance provided in Fla. Stat. §921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.
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> 283 So.2d at 9

The reasonableness of the trial judge's and Songer's counsel's view of the statute was further born out in Cooper v. State, 336 So.2d 1133 (Fla. 1976). The Florida Supreme Court in Cooper stated:

> The sole issue in a sentencing hearing under Section 921.141 . . . is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding . . . The Legislature chose to list the mitigating circumstances which it judged to be reliable. . ., and we are not free to expand the list.
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> 336 So.2d at 1139.[8]

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[8] The Florida Supreme Court, after Lockett had been decided, ruled that neither the statute nor its previous decisions precluded the introduction of non-statutory mitigating circumstances. State v. Songer, 365 So.2d 696 (Fla. 1978). Although, in somewhat of an understatement, the court has recognized that the statute and its own decisons could have been misconstrued by courts to limit the consideration of mitigating factors. See Perry v. State, 395 So.2d 170, 174 (Fla. 1981); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). This limitation has also been recognized by the federal courts. See, e.g., Spaziano v. Florida, __ U.S. __, 104 S.Ct. 3154, 82 L.Ed.2d 340, 347 n.4 (1984); Barclay v. Florida, __ U.S. __, 103 S.Ct. 3418, 77 L.Ed.2d 1134, 1151-52 (1983); Foster v. Strickland, 707 F.2d 1339, 1346 (11th Cir. 1983); Ford v. Strickland, 696 F.2d 804, 812 (11th Cir. 1983) (en banc), cert. denied, __ U.S. __, 104 S.Ct. 201 (1983).

Thus, the majority's conclusion that there was no error in the jury sentencing phase of Songer's trial is not supported by the record in this case. However, the error was not due to the fault of either the trial judge or Songer's counsel. Florida law, as reasonably and logically construed by both, operated to preclude non-statutory mitigating evidence.

C. The Independent Significance of the Jury Instructions

Even if counsel had not felt constricted in his presentation of evidence, the effect of the trial judge's instructions rendered the sentencing proceeding unconstitutional and are an independent reason why the jury's recommendation was reached in a manner contrary to Lockett,

supra.[9]

As was stated previously, the instructions improperly limited the jury's consideration of mitigating evidence. In Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949, (1982), the court held that jury instructions improperly restricted the

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9 Songer's brief testimony at the penalty phase, mentioned previously, included mention of several facts that arguably did not relate to any of the statutory mitigating circumstances. The fact that Songer's attorney elicited this information from the defendant does not conflict with the conclusion that state law restricted his presentation of mitigating evidence. The arguably non-statutory circumstances were mentioned briefly and in connection with testimony regarding statutory factors.

The fact that Songer did not object to these instructions or raise the issue on direct appeal does not preclude consideration of the claim because the Florida Supreme Court has addressed the merits of the claim. See County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

consideration of mitigating evidence because the trial court had instructed the jury to "consider the following elements of mitigation," had read the list of the statutory mitigating factors, and then had given this description of the jury's task, "[If you find] one or more of the preceeding [statutory] elements of mitigation exist[s], then you must consider whether it outweighs the aggravating circumstances." This paraphrase of the statute followed by an erroneous description of the jury's task "operated affirmatively to preclude jury consideration of nonstatutory mitigating factors." Id. at 1377. Similarly in this case, a paraphrased version of the statute was followed by a faulty description of the jury's task contained in the verdict forms that called on the jury to consider whether "sufficient

mitigatng circumstances [as] defined in the Court's charge" existed to outweigh the aggravating circumstances. This instruction, just as the one in Washington, refers to the previously listed mitigating factors in describing the sort of evidence that could lead to a recommendation of life imprisonment, and thus, affirmatively misled the jury regarding the status of non-statutory mitigating evidence.

This court held in Ford v. Strickland, supra, that an instruction which stated with regard to mitigating circumstances that the jury "shall consider" the statutory list of mitigating factors did not restrict the jury's consideration of mitigating evidence. But the holding in Ford was a narrow one, inapplicable in this case for several reasons. First, the instruction in Ford dealt with only one

section of the statute, the "shall" language of subsection (6), rather than the more misleading "as enumerated" language of subsection (2). The observation of the Supreme Court in Proffitt v. Florida, 428 U.S. 242, 250, n.8, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), relied upon by the Ford court, was also based upon a reading of subsection (6) without any mention of subsection (2). In this case, by contrast, both sections of the statute were mentioned. Second, the Ford court distinguished Washington v. Watkins, 655 F.d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949, (1982), by noting the restrictive language that appeared in that case after the list of statutory mitigating factors. Such language was missing from the Ford instruction but was present in Washington

and in this case. See Alvord v. Wainwright, 725 F.2d 1282, 1299 (11th Cir.) modified, 731 F.2d 1486, cert. denied, __ U.S. __, 105 S.Ct. 355 (1984). Third, the defendant in Ford had not been precluded from introducing any mitigating evidence and the trial judge believed that the statute contained no such restrictions. In this case, as the previous discussion indicates, counsel for Songer and the judge himself held a restrictive view of the statute and that view was imparted to the jury in the charge.

In sum, this case is controlled by Washington v. Watkins rather than Ford v. Strickland. The instructions improperly restricted the jury's consideration of mitigating circumstances in violation of Lockett, supra.

II. Conclusion

What the previous discussion has made clear is that the errors did not, as the majority concludes, only affect the trial judge's weighing of the evidence. The only conclusion consistent with this record is that the entire sentencing proceeding was unconstitutionally limited. Able trial counsel did not investigate or present non-statutory mitigating evidence. The trial judge did not believe it was admissible anyway. He instructed the jury to weigh the statutory aggravating circumstances against the statutory mitigating circumstances and also limited his own consideration in that fashion. Both the jury and judge decided that death was the appropriate penalty. As the constitutional infirmity in Songer's sentencing proceeding was manifest throughout the

proceeding, he is entitled to a new penalty phase proceeding before a jury, not only before the judge.[10] Therefore, I respectfully dissent.

The state trial judge, who was also the judge who presided over the petitioner's post-conviction hearings, was admirably candid in stating his view of how the statute operated in 1974. He acknowledged that mitigating evidence now admissible under current death penalty jurisprudence was available at the time of trial. Hopefully, in the interest of justice he will require what the majority leaves as an option and will impanel a new

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10 See Menendez v. State, 419 So.2d 312, 314 (Fla. 1982) (where there is error regarding the instructions and evidence at the sentencing proceeding, a defendant is entitled to a new jury both to hear evidence and to make a recommendation as to sentence.)

advisory jury to hear all available mitigating evidence. Despite the long history of this case in the courts, both state and federal, if such a hearing is held before a new jury, the fate of Carl Ray Songer should be finally determined.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-3500

CARL RAY SONGER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, etc., and
RICHARD L. DUGGER, etc.,

Respondents-Appellees.

Appeal from the
United States District Court
for the Middle District of Florida

(August 16, 1985)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

PER CURIAM:

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*Judge Joseph W. Hatchett recused himself and did not participate in this decision.

On May 18, 1984, a panel of this court entered an opinion in this matter, 733 F.2d 788 (11th Cir. 1984). By order dated January 29, 1985, the same panel denied petitioner's motion to recall the mandate and for stay of execution of his death sentence, 755 F.2d 1394 (11th Cir. 1985). Thereafter, a majority of the court voted to recall the mandate and consider this case en banc, 756 F.2d 799 (11th Cir. 1985).

During this same period petitioner filed a successive petition. After dismissal by the district court, it came to this court as case number 85-3064. A panel of this court granted a stay of execution and that matter was voted en banc. Today the court en banc has issued its ruling in 85-3064. Petitioner has been granted a new sentencing hearing.

A majority of the court now votes to not consider this case en banc. The opinion and order of May 18, 1984 and January 29, 1985 are REINSTATED.

The clerk shall issue the mandate in this matter simultaneously with the issuance of the mandate in case number 85-3064.

Carl Ray SONGER,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, etc., and
Richard L. DUGGER, etc.,
Respondents-Appellees.

No. 83-3500.

United States Court of Appeals,
Eleventh Circuit.

April 9, 1985.

Joseph Jordan, West Palm Beach, Fla., Deval Patrick, New York City, for petitioner-appellant.

Frank Lester Adams, III, Peggy A. Quince, Asst. Attys. Gen., Tampa, Fla., for respondent-appellees.

On Appeal from the United States Disrict Court for the Middle District of Florida; HOWELL W. MELTON, Judge.

ON SUGGESTION FOR
REHEARING EN BANC

(Opinion May 18, 1984, 11th Cir., 1984, 733 F.2d 788; Order of January 29, 1985, 11th Cir., 1985, 755 F.2d 1394)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

BY THE COURT:

By order entered March 20, 1985, 756 F.2d 1482, the court has ordered that No. 85-3064 (Songer II) be heard by the court en banc, with oral argument.

In 83-3500 (Songer I), a judge in regular active service has moved that the court en banc rehear the merits of the case, with oral argument, along with the en banc hearing on Songer II. A majority

*Judge Joseph W. Hatchett is recused and did not participate in this decision.

of the judges in regular active service have voted in favor of the motion.

It is ORDERED that 83-3500 (Songer I) shall be reheard by this court sitting en banc with oral argument, along with the hearing en banc in Songer II. The cases are consolidated for this purpose. The clerk will specify, and coordinate, briefing schedules for the filing of en banc briefs. The previous panel's opinion filed on May 18, 1984, and the order of the panel entered January 29, 1985 are VACATED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-3064

CARL RAY SONGER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
RICHARD DUGGER, Superintendent,
Florida State Prison, Starke,
Florida,

Respondents-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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ORDER (INCLUDING STAY OF EXECUTION)

BEFORE GODBOLD, Chief Judge, HILL and KRAVITCH, Circuit Judges:

A motion to recall the mandate and for stay of execution has been denied by another panel of this court in the case of Songer v. Wainwright (83-3500), the case concerning Songer's first federal habeas petition. A majority of the active qualified judges of the court have voted in favor of en banc rehearing of that motion and an order to that effect has been entered.

Before us is Songer's second federal habeas petition. It is our view that this case should be heard by the court en banc along with Hitchcock v. Wainwright, (83-3578). We respectfully request that this be done, and we ask for a poll of the active judges for this purpose.

Our reasons include these: the substantive issue raised in the successive petition context is the constitutionality

of petitioner's sentencing hearing conducted in 1974. In petitioner's second state 3.850 proceeding, held last week, the presiding judge, who conducted petitioner's 1974 trial and sentencing and his resentencing in 1977, at least implied that in 1974 his opinion of Florida law concerning admissibility of evidence of non-statutory mitigating circumstances was more limited than later required by the Supreme Court of the United States in Lockett v. Ohio, 438 U.S. 566 (1978). In this second state proceeding the judge premised at least part of his decision to deny relief upon a finding that Lockett was not retroactive. We are unable to determine whether his decision might be differenct if Lockett is held retroactive, an issue that may possibly be determined in Hitchcock. This information concerning the trial judge was not presented in the

first federal habeas case. Moreover, when petitioner was resentenced in 1977, he attempted to introduce non-statutory mitigating evidence, but was not permitted to do so because the trial judge interpreted the remand as limited to the Gardner v. Florida, 438 U.S. 349 (1977), issue relating to his presentence report. This refusal was reviewed by the Supreme Court of Florida after Lockett was decided.

In general we are not able to predict the exact contours of any en banc decision that may be rendered in Hitchcock on the Lockett issue in the case, and the extent, if any, to which this issue might affect this case. Nor can we, as a panel of the court, properly attempt to decide or limit what the court may decide in Hitchcock. Without knowing the parameters of Hitchcock, we cannot say with assurance

what, if any, issues in this case may fall outside of Hitchcock.

In implementation of the vote of a majority of judges in favor of en banc rehearing on the denial of withdrawal of the mandate and denial of a stay, and on our own authority as the panel to whom the second petition is assigned, we ORDER that a STAY OF EXECUTION IS GRANTED pending the further orders of the Court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-3500

CARL RAY SONGER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, ETC., and
RICHARD L. DUGGER, ETC.,

Respondents-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

BEFORE GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON, and CLARK, Circuit Judges[1]:

Members of this Court in active service have requested a poll on the application of petitioner for a rehearing en banc on the denial of the motion to recall the mandate and for a stay of execution, and a majority of the active qualified judges have voted in favor of en banc consideration. It is, therefore, ORDERED that petitioner's application shall be considered en banc.

The Court en banc is informed that the panel of the Court considering the second petition case of Songer v. Wainwright, No. 85-3064, intends to issue

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1 Judge Joseph W. Hatchett recused himself and did not participate in this decision.

a stay of execution pending the further order of the Court. Action by the Court en banc on the matter of the recall of the mandate and the matter of a stay is, therefore, held in abeyance, since it appears that the matter of a stay will be mooted by the action of the panel in No. 85-3064 and that action on the recall of the mandate is not necessary.

/s/ John C. Godbold
Chief Judge

RONEY, Circuit Judge, specially concurring:

As a panel member in Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984), I concurred in an order denying the motion asking this Court to withdraw the mandate and stay Songer's execution pending the en banc consideration of Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir.

1984). Songer v. Wainwright, ___F.2d___ (11th Cir. 1985)[No. 83-3550, Jan. 29, 1985].

I was then and am now of the view that the decision of the Court en banc in Hitchcock will not reach Songer's argument as made to the Court on this appeal, because he was sentenced prior to Cooper v. State, 336 So.2d 1133 (Fla. 1976). To the extent that Songer's argument addressed the facial constitutionality of the Florida statute, ineffectiveness of counsel, and jury instructions under a Lockett theory, unencumbered by the Cooper decision, those issues have been fully litigated and to my mind have been properly decided on sound precedent by the Florida Supreme Court, see citations in order denying the motion, ___F.2d___, by the United States District Court, 571 F. Supp. 1384 (M.D. Fla. 1983), and by the

panel of this Court after full briefing and oral argument. Panel rehearing was denied, no member of this Court requested a poll on the suggestion of rehearing en banc, and the United States Supreme Court denied certiorari. In my judgment the motion for withdrawal of the mandate was nothing more than an attempt to get an extraordinary rehearing on issues already decided.

A new petition for habeas corpus relief was filed subsequent to the issuance of the mandate in this case. To the extent that the record and arguments on that appeal may differ from the record and arguments previously made, I take no position. Nothing on that appeal is presently before me, and I make no suggestion as to whether or not it has merit.

The concept of finality of judicial

process is jeopardized if not completely fractured by a Court's willingness to reconsider old arguments and entertain new ones after a party has had full opportunity for litigation, a case has been carefully considered by the Court, and the Supreme Court has either affirmed the decision or denied certiorari. Absent some clarion call that a miscarriage of justice is about to occur, because of some clearly controlling newly discovered fact or newly developed law, no court should respond to any such overtures.

And yet, five of my colleagues think that is the thing to do in this case. Apparently it is thought that the Hitchcock decision may change the law in this Circut in a way that would reach Songer's arguments.

The petition is addresed to eleven judges, one of our number being recused.

Two senior judges, Judge Simpson, a member of the panel on this case, and Judge Morgan, a member of the Hitchcock panel, cannot vote in this poll. Each would be entitled to sit with the en banc court in the respective cases.

In this situation, to avoid mooting an ultimate decision that my colleagues are right about the potential reach of Hitchcock, it seems to me that I must join to make a majority of circuit judges in regular active service to order the proceding to be reheard en banc. It should be noted that no argument has been addressed to this Court concerning the jurisdiction or authority of the en banc court in this regard. By this decision, I merely assume with some doubt, but make no determination, that this en banc Court has jurisdiction to enter this order.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-3500

CARL RAY SONGER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, ETC., and
RICHARD L. DUGGER, ETC.

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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BEFORE RONEY, and VANCE, Circuit Judges, and SIMPSON, Senior Circuit Judge:

On January 24, 1985, Carl Ray Songer filed a motion to recall the mandate and for stay of execution of his death sentence pending this Court's en banc consideration of Hitchcock v. Wainwright, No. 83-3578.

After conviction of first degree murder of a Florida Highway Patrolman, Songer was sentenced to death in 1974. The Florida Supreme Court affirmed in Songer v. State, 322 So.2d 481 (Fla. 1975). The United States Supreme Court vacated the death sentence and remanded for reconsideration in light of Gardner v. Florida, 430 U.S. 349 (1977). Songer v. Florida, 430 U.S. 952 (1977). After further proceedings in which counsel was allowed to review and rebut a presentence investigtion report not previously disclosed, the trial court reimposed the

death sentence on August 17, 1977. The Florida Supreme Court affirmed. Songer v. State, 365 So.2d 696 (Fla. 1978). The United States Supreme Court denied certiorari. Songer v. State, 441 U.S. 956 (1979).

Following a death warrant in 1980, Songer sought and was denied state collateral relief. Songer v. State, 419 So.2d 1044 (Fla. 1982). Following a death warrant in 1982, a state petition for habeas corpus relief was denied by the Florida Supreme Court. Songer v. Wainwright, 423 F.2d 355 (Fla. 1982).

A United States District Court denied federal habeas corpus relief after a hearing. Songer v. Wainwright, 571 F. Supp. 1384 (M.D. Fla. 1983). After regular briefing and oral argument, this Court affirmed. Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984). A petition for

rehearing and suggestion for rehearing en banc were denied on June 26, 1984. The United States Supreme Court denied certiorari on January 7, 1985. Songer v. Wainwright, 53 U.S.L.W. 3480 (Jan 9, 1985). During the period of this litigation, outstanding death warrants had been stayed.

The mandate denying relief was issued by this Court on January 11, 1985, and no previously entered stays remained effective. The State has scheduled Songer's execution for February 5, 1985 at 7:00 a.m.

To the extent that Hitchcock v. Wainwright, supra, may focus on the effect of Cooper v. State, 336 So.2d 1133 (Fla. 1976), on sentencing in Florida prior to the decision in Songer v. State, 365 So.2d 696 (Fla. 1978), that issue is not present in this case because Songer was sentenced

two years before the Cooper decision, in 1974. The resentencing in 1977 was solely for the purpose of dealing with the Gardner issue by trial judge, and was not a jury resentencing.

The motion to recall the mandate and application for stay of execution are DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CARL RAY SONGER,

Petitioner,

vs. Case No. 85-14-Civ-OC-12

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and RICHARD L. DUGGER, Superintendent, Florida State Prison, Starke, Florida,

Respondents.

OPINION AND ORDER DENYING SECOND PETITION FOR WRIT OF HABEAS CORPUS

This cause came before the Court on Second Petition for Writ of Habeas Corpus, filed on January 31, 1985, by CARL RAY SONGER, a death-row inmate at Florida State Prison. On the same date, respondents filed their response to the petition. On February 1, 1985, the Court heard argument on all the grounds raised in the petition. After extensively reviewing the entire record herein, and after carefully considering argument of counsel for the respective parties, the Court is of the opinion that the second petition should be dismissed pursuant to Rule 9(b), Rules Governing Section 2254 Cases in the United States District Courts.

PROCEDURAL HISTORY

On December 23, 1973, petitioner was charged with the first-degree murder of

Florida Highway Patrolman Ronald Smith on a rural road in Citrus County, Florida. The trial was transferred to Osceola County, Florida. The petitioner was convicted of first-degree murder, and judgment of conviction was entered on February 27, 1974. On the same date, the jury returned an advisory sentence recommending the death penalty, and the trial judge imposed the sentence of death. The Supreme Court of Florida affirmed petitioner's judgment and sentence in Songer v. State, 322 So.2d 481 (Fla. 1975). The Supreme Court of the United States, however, in Songer v. Florida, 430 U.S. 952 (1977), vacated the sentence and remanded for reconsideration in light of the ruling in Gardner v. Florida, 430 U.S. 349 (1977). On remand for resentencing, the trial judge reimposed the death sentence on August 17, 1977. The Supreme

Court of Florida again affirmed the sentence of death in Songer v. State, 365 So.2d 696 (Fla. 1978), and the United States Supreme Court denied certiorari in Songer v. Florida, 441 U.S. 956 (1979).

In September 1980, the Governor of Florida signed a death warrant ordering petitioner's execution during the week commencing October 3, 1980. Pursuant to Rule 3.850, Fla. R. Crim. P., petitioner filed a Motion to Vacate Judgment and Death Sentence on September 24, 1980 [hereinafter first 3.850 motion]. After a hearing [hereinafter first 3.850 hearing], the trial judge denied petitioner's first 3.850 motion in an order entered September 30, 1980 [hereinafter first 3.850 order]. Petitioner's execution, however, was stayed by the Supreme Court of Florida on September 26, 1980, upon the filing by petitioner and 122 other death-row inmates

of an application for extraordinary relief and petition for writ of habeas corpus, which was subsequently denied in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

The trial court's denial of petitioner's first 3.850 motion was affirmed by the Supreme Court of Florida on September 9, 1982. Songer v. State, 419 So.2d 1044 (Fla. 1982). On November 5, 1982, the Governor of Florida signed a second death warrant and petitioner's execution was scheduled for December 7, 1982. On November 22, 1982, petitioner filed in the Supreme Court of Florida a petition for writ of habeas corpus, which was denied in Songer v. Wainwright, 423 So.2d 355 (Fla. 1982).

On December 1, 1982, petitioner filed in this Court his first petition for writ of habeas corpus [hereinafter first

petition] and an application for stay of execution. On December 3, 1982, this Court granted a stay of execution pursuant to the mandate of the United States Court of Appeals for the Eleventh Circuit [hereinafter Eleventh Circuit] in Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982). Subsequent to the resolution of the issue underlying the order of stay, see Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), this Court dissolved its stay entered on December 3, 1982, and denied relief following a hearing. Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983). On May 18, 1984, the Eleventh Circuit affirmed this Court's denial of the first petition. Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984). On January 7, 1985, the United States Supreme Court denied certiorari. Songer v. Wainwright, 53 U.S.L.W. 3480 (U.S. Jan. 7, 1985) (No.

84-5690). On January 24, 1985, petitioner filed with the Eleventh Circuit a motion to recall the mandate and application for stay of execution, which motion and application were denied on January 29, 1985. Songer v. Wainwright, No. 83-3500 (11th Cir. Jan 29, 1985) (as amended by order of Feb 1. 1985).

On January 10, 1985, the Governor of Florida signed the third death warrant ordering petitioner's execution during the week commencing at noon on January 30, 1985, and ending on February 6, 1985. On January 24, 1985, petitioner filed in the Circuit Court of the Fifth Judicial Circuit, in and for Citrus County, Florida, the following three motions: Motion Pursuant to Fla. R. Crim. P. 3.850 for Post-Conviction Relief and to Vacate Sentence [hereinafter second 3.850 motion]; Motion for Evidentiary Hearing;

and Application for Stay of Execution. An evidentiary hearing was held before Florida Circuit Court Judge John W. Booth on petitioner's second 3.850 motion and application for stay of execution on January 25, 1985 [hereinafter second 3.850 hearing]. Both motions were denied in an order entered on January 27, 1985 [hereinafter second 3.850 order].

On January 28, 1985, petitioner filed a notice of appeal of the second 3.850 order with the Supreme Court of Florida. On January 30, 1985, the Supreme Court of Florida heard argument of counsel on the appeal from the second 3.850 order. On January 31, 1985, the Supreme Court of Florida affirmed the second 3.850 order. Songer v. Wainwright, No. 66,474 (Fla. Jan. 31, 1985).

Petitioner filed the instant petition [hereinafter second petition] with this

Court at 10:30 a.m. on January 31, 1985, together with a motion for leave to proceed in forma pauperis, and an emergency application for stay of execution. Petitioner filed a supporting memorandum on February 1, 1985. The Court heard argument of counsel and received the transcript of the second 3.850 hearing into evidence on February 1, 1985.

GROUNDS FOR RELIEF

In this second petition for federal habeas corpus, petitioner alleges four interrelated grounds for relief:

1. That petitioner was precluded from introducing evidence of nonstatutory mitigating factors in violation of the sixth, eight, and fourteenth amendments to the United States Constitution;

2. That petitioner was denied effective assistance of counsel at both the sentencing and resentencing proceedings in violation of the sixth, eight, and fourteenth amendments to the United States Constitution;

3. That petitioner's advisory jury was instructed to limit its deliberations on mitigating circumstances to those

enumerated in the statute in violtion of the eighth and fourteenth amendments to the United States Constitution; and

4. That the trial court failed to explain mitigating and aggravating circumstances and the option to recommend against the death penalty in violation of the eighth and fourteenth amendments to the United States Constitution.

The four claims are different facets of the same alleged problem, namely that no evidence of nonstatutory mitigating factors was introduced at petitioner's sentencing or resentencing proceedings. Petitioner contends that the absence of nonstatutory mitigating evidence deprived petitioner of a constitutional penalty proceeding in violation of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982).

Respondents contend that this petition is a "successive petition" and should therefore be dismissed pursuant to Rule 9(b), Rules Governing Section 2254 Cases in the United States District Courts

[hereinafter Rule 9(b)]. Rule 9(b) provides as follows:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds tht it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b) codified Sanders v. United States, 373 U.S. 1 (1963), in which the Supreme Court recognized that while res judicata is inapplicable to habeas corpus proceedings, federal courts are not powerless to protect themselves from harassing and repetitive petitions. Id. at 7. Sanders set forth two requirements that must be satisfied before a court may dismiss issues in a successive federal habeas corpus petition pursuant to Rule 9(b): (1) the issues have been

adjudicated on the merits in a prior petition and (2) the ends of justice would be served by a redetermination of the issues. Id. at 16-17.

Petitioner and respondents in the instant petition have agreed that all four issues raised in the second petition were raised in the first petition. Transcript of Second Petition Hearing at 14, 42-43. Having been raised in the first petition, all four issues have been adjudicated on the merits after hearings both in this Court on the first petition and before the trial court on petitioner's first 3.850 motion. Accordingly, this Court's determination as to whether the four issues in the second petition should be dismissed is limited to a determination of whether the ends of justice would be served by a redetermination of the issues.

The Court in Sanders and the Eleventh Circuit have provided at least three

examples of situations in which the ends of justice would be served by redetermining issues presented in a prior petition. In the first instance, a petitioner may gain a redetermination where factual issues are involved by "showing that the evidentiary hearing on the prior application was not full and fair." Sanders, 373 U.S. at 16-17. Second, where questions of law are involved, petitioner "may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." Id. at 17. Third, petitioner may be entitled to a redetermination "when the denial of the first rested on a court's plain erorrs of law." Bass v. Wainwright, 675 F.2d 1204, 1207 (11th Cir. 1982) (quoting Cancino v.

Craven, 467 F.2d 1243, 1246 (9th Cir. 1972).

Petitioner advances an argument as to each of the three situations in which the ends of justice would require a redetermination of the issues. Petitioner first argues that he should be accorded a redetermination of the issues because the following alleged facts were not before the Court in the first petition and hearing: (1) the affidavit and testimony of juror Lisa Crews [hereinafter Crews] stating that the judge had told the jurors that they could not consider anything other than the statutory aggravating and mitigating circumstances listed on the form; (2) the affidavit and testimony of petitioner's trial attorney C. John Coniglio [hereinafter Coniglio] as to his belief that the Florida sentencing statute precluded the introduction of nonstatutory

mitigating evidence; and (3) the second 3.850 hearing and order in which the trial judge expressed his understanding of whether nonstatutory mitigating evidence could have been introduced at the time of petitioner's penalty phase proceeding. Petitioner is not entitled, however, to a redetermination of the issues on the basis of this newly-proffered testimony because petitioner has not shown that the evidentiary hearing on the prior petition was not full and fair.

As to the first factual allegation, the testimony of juror Crews could not have been considered during the first petition proceeding and cannot be considered in the instant petition. Under both federal and state law, a juror cannot testify as to matters which were inherent in the deliberative process and which led to a verdict. Fed. R. Evid. 606(b); Fla.

Stat. § 90.607(2)(b) (1983). Thus petitioner was not and is not now entitled to introduce this testimony at a hearing on the allegation.

As to Coniglio's newly-proffered testimony, Coniglio testified at length at the first 3.850 hearing on his and petitioner's approach to the presentation of mitigating evidence at the sentencing hearing. Transcript of First 3.850 Hearing at 68-70, 72-76. In adjudicating this issue in the first petition, this Court also had before it and considered the transcript of the sentencing proceedings. At the sentencing hearing, the trial court received all the mitigating evidence which Coniglio offered. Furthermore, Coniglio was subpoenaed for the first petition hearing, but was released by counsel prior to testifying. Transcript of First Petition

Hearing at 72-73. In the same way that a court should be constrained from using hindsight to evaluate a counsel's performance, counsel himself should not be given repeated opportunities to rethink his performance in light of what he would do more than a decade later. Accordingly, the Court is of the opinion that Coniglio's newly-proffered testimony does not justify a redetermination of issues adjudicated in the first petition, which adjudication was based on testimony and evidence proffered in full and fair hearings on the first 3.850 motion and the first petition.

Finally, the fairness of the first petition hearing is not undercut by the trial court's statement that at the time of the sentencing hearing he interpreted the Florida statute to prohibit introduction of nonstatutory mitigating

evidence. The trial court's interpretation does not add significantly to the evidence before this Court at the hearing on the first petition. Regardless of the trial court's interpretation, the issue whether the jury was properly instructed at the sentencing hearing was raised and ajudicated in the first petition. Songer, 571 F. Supp. at 1398-99. Furthermore, the trial court did not in fact exclude any proffered evidence at the sentencing hearing; the trial court's interpretation of the Florida statute did not therefore taint the sentencing proceedings. Consequently, the absence of information as to the trial court's interpretation of the Florida statute did not deprive petitioner of a full and fair hearing on the first petition.

Petitioner secondly asserts that he

should be granted a new hearing and a redetermination of the issues because of intervening change in the law, citing to the Eleventh Circuit's pending en banc consideration of Hitchcock v. Wainwright, 745 F.2d 1332 (1984), reh'g granted en banc, No. 83-3578 (11th Cir. Jan 8, 1985). This Court is of the opinion that it is precluded from considering Hitchcock as an intervening change in the law because of the Eleventh Circuit's order of January 29, 1985, which order denied Petitioner-Appellant's Motion to Recall the Mandate and Application for Stay of Execution. The order, as amended by order of February 1, 1985, reads in pertinent part as follows:

> To the extent that Hitchcock v. Wainwright, supra, may focus on the effect of Cooper v. State, 336 So.2d 1133 (Fla. 1976), on sentencing in Florida prior to the decision in Songer v. State, 365 So.2d 696 (Fla. 1978), that issue is not present

> in this case because Songer was sentenced two years before the Cooper decision, in 1974. The resentencing in 1977 was solely for the purpose of dealing with the Gardner issue by the trial judge, and was not a jury resentencing.

This Court does not find a basis to apply Hitchcock to the instant case, outside the limitations of the Eleventh Circuit's order, thereby precluding petitioner from succeeding on his argument that the issues should be redetermined because of intervening law.

Finally, petitioner contended during oral argument that this Court should determine that petitioner is entitled to a redetermination because no court has squarely addressed this issue. Petitioner contends that no court to date, except for the trial court in the second 3.850 order, has ruled on the applicability of Lockett to this confluence of facts. Transcript

of Second Petition Hearing at 52. Peitioner argues that the courts have instead ruled only on the "facial constitutionality or validity of the Florida statutes." Id. at 57. Petitioner's contention is without merit. The issue of Lockett violation was raised and adjudicated in the first petition after a full and fair hearing. Songer, 571 F. Supp. at 1393-97, 1398-1400; see also Songer v. Wainwright, 53 U.S.L.W. 3480 (U.S. Jan. 7, 1985) (No. 84-5390) (Brennan, Marshall, J.J., dissenting)

Having concluded that the ends of justice would not be served by a redetermination of the issues raised in this petition, the Court must next determine whether to issue a certificate of probable cause to appeal, pursuant to 28 U.S.C. §2253 (1982). The United States Supreme Court recently set forth the

standard for granting a certificate of probable cause in Barefoot v. Estelle, 103 S.Ct. 3383 (1983):

> In requiring a "question of some substance," or a "substantial showing of the denial of [a] federal right," obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner], or that the questions are "adequate to deserve encouragement to proceed further."

Id. at 3394 n. 4 (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980).

As previously mentioned, this Court must follow the Eleventh Circuit's order of January 29, 1985, as amended on February 1, 1985, which denied petitioner's motion to recall the mandate and grant a stay of execution pending the

disposition of Hitchcock. Although this Court has not found a basis to apply Hitchcock to the instant case, outside the limitations of the Eleventh Circuit's order, the undersigned concludes that this Court's determination of the applicability of Hitchcock may be debatable among jurists. Since this is a capital case, petitioner should not be foreclosed from urging such contention on appeal from this opinion and order. The Court is of the opinion, therefore, that a certificate of probable cause should be granted. Accordingly, it is

ORDERED AND ADJUDGED:

1. That the Petition for Writ of Habeas Corpus, filed herein on January 31, 1985, is hereby denied;

2. That the Application for Stay of Execution, filed herein on January 31, 1985, is hereby denied;

3. That petitioner is hereby granted leave to appeal in forma pauperis pursuant to 28 U.S. C. § 1915 (1982);

4. That a certificate of probable cause to appeal shall be issued, pursuant to 28 U.S.C. §2253 (1982); and

5. That the Clerk of the Court shall enter Judgment dismissing this action.

DONE and ORDERED in Chambers at Jacksonville, Florida, this 2nd day of February, 1985.

/s/ Howell W. Melton
United States District Judge

Copies to:
Counsel of Record

SUPREME COURT OF FLORIDA

No. 66,472

CARL RAY SONGER,

Appellant

vs.

STATE OF FLORIDA,

Appellee.

[January 31, 1985]

ADKINS J.

Carl Ray Songer appeals the denial of his motion to vacate judgment and death sentence. He also files an application of stay of execution. We have jurisdiction. Art. V, §3(b)(1), Fla. Const.

Songer was convicted of the first-degree murder of Florida Highway Patrolman Ronald G. Smith and sentenced to death. The facts of the case are set forth in the first direct appeal to this Court in which we affirmed the conviction and sentence. Songer v. State, 322 So.2d 481 (Fla. 1975) (Songer I). The United States Supreme Court vacated appellant's sentence and remanded the case to this Court for reconsideration in light of the ruling in Gardner v. Florida, 430 U.S. 349 (1977). Songer v. Florida, 430 U.S. 952 (1977).

On remand to the trial court for

resentencing a death sentence was again imposed. We affirmed the second sentence. Songer v. State, 365 So.2d 696 (Fla. 1978) (Songer II).

Appellant subsequently filed his first motion to vacate judgment and sentence and this Court affirmed the order of the trial judge denying relief. Songer v. State, 419 So.2d 1044 (Fla. 1982). (Songer III).

A petition for habeas corpus alleging ineffective assistance of counsel on his direct appeal and his appeal from resentencing was then filed in this Court. We dismissed the petition and denied the motion for a stay of execution. Songer v. State, 423 So.2d 355 (Fla. 1982)(Songer IV).

Appellant then raised his state court claims in a petition for writ of habeas corpus in the federal district court. The

petition was denied. Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983). The Eleventh Circuit affirmed the denial of the writ. Songer v. Wainwright, 738 F.2d 451 (11th Cir. 1984). A petition for writ of certiorari was denied by the United States Supreme Court. Songer v. Wainwright, 53 U.S.L.W. 3480 (U.S. Jan. 7, 1985).

After relief was denied in the federal courts on appellant's habeas corpus petition, he once again filed a 3.850 motion in the circuit court. This appeal comes to us from the denial by the circuit court of appellant's second motion to vacate.

In his appeal to this Court Songer argues that he was denied a full and fair individualized sentencing hearing at his trial in 1974 because his defense counsel reasonably believed, and this belief was

shared by the trial judge and the prosecutor, that Florida law at that time precluded the admission of any mitigating character evidence other than that enumerated in the applicable statute, section 921.141(7), Florida Statutes (1983). He contends that he has newly discovered evidence that will prove his claim. This evidence consists of the testimony of trial defense counsel at the hearing that he believed he was precluded from offering any non-statutory mitigating evidence and the testimony of a juror at Songer's trial that she believed she could only consider the statutorily enumerated mitigating factors.

Regarding the testimony of the juror, the trial judge properly determined that it was not admissible under section 90.607(2)(b), Florida Statutes (1983), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

See also McAllister Hotel, Inc. v. Porte, 123 So.2d 339 (Fla. 1960), and Linsley v. State, 88 Fla. 135, 101 So. 273 (1924). That leaves only the testimony of defense counsel and appellant has provided no compelling reason to this Court why that testimony was not available at the time appellant filed his first 3.850 motion. Furthermore, the issue of the presentation of mitigating evidence under Lockett v. Ohio, 438 U.S. 586 (1978), was addressed by this Court in Songer II on rehearing where we held that neither the wording of section 921.141 nor our previous decisions precluded the introduction of nonstatutory mitigating evidence. 365 So.2d at 700. The law in Florida is that a trial court

is not obligated to entertain a successive 3.850 motion which raises grounds previously raised and disposed of on the merits in a prior 3.850 proceeding. McCrae v. State, 437 So.2d 1388 (Fla. 1983). Appellant's claim that he has been subjected to cruel and unusual punishment by his eleven-year stay on death row and his three trips to the death watch is without merit. Thus, we hold the trial judge did not err in denying appellant's motion to vacate.

In conclusion, we affirm the order of the trial court denying appellant's motion to vacate judgment and sentence. Appellant's motion for a stay of execution is also denied.

It is so ordered.

BOYD, C.J., OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur

THE CIRCUIT COURT OF
CITRUS COUNTY, FLOIRDA

STATE OF FLORIDA,

vs. Criminal Case No. 74-49 CF

CARY RAY SONGER,

Defendant

ORDER ON MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE coming on to be heard on the Motion for Post-Conviction Relief and the Amendment thereto with Petitioner present and represented by counsel, and the State appearing by counsel from the State Attorney's Office for the Fifth Judicial Circuit and the State Attorney General's Office, and this Court having reviewed the pleadings and memoranda filed by the parties, hearing testimony, and being fully advised in the premises, making the following:

STATEMENT OF THE CASE

The following factual synopsis is taken directly from the Florida Supreme Court Opinion Songer v. State, 322 So.2d 481 (Fla. 1975), which affirmed Songer's conviction and sentence of death:

"At approximately 6:00 A.M. on the cold morning of December 23, 1973, hunters looking for dogs observed an automobile with its motor running, parked on a gravel road about fifty yards from U.S. Highway 19 near Crystal River, in Citrus County, Florida. They approached the car, knocked on the window of the passenger side and spoke to one, Ronald Jones, who raised up from a prone position on the front seat. The Appellant was lying down on the rear seat with his face toward the front. Although he did not sit up or speak to them, Appellant's eyes were opened and he appeared to be listening to the conversation about dogs going on between one of the hunters, in the presence of the other, with Jones.

Between 8:30 and 9:00 A.M. two other hunters were about thirty feet behind Trooper Ronald G. Smith of the Florida Highway Patrol when he stopped to check the parked vehicle. These hunters saw Smith approach the car, talk with Jones, search Jones at the rear of the auto, and return to the car with his hand on his pistol. Thereupon, Smith leaned into the car. Suddenly, a fusillade of shots occurred, after which the officer was dead (death resulted from a loss of blood due to four bullet wounds in deceased's upper body plus a wound in one knee). The Appellant came out

of the back seat of the automobile, shot once toward the hunters, jumped back inside the car with Jones driving, attempted to make his getaway.

One of the hunters, armed with a .308 semi-automatic rifle, shot certain tires out of the moving automobile causing it to stop. Its occupants attempted to escape by running, but after Jones was shot in the foot by one of the hunters, the Appellant advisedly surrendered, holding his hands with his pistol in one over his head and upon being so ordered, tossed the pistol over the car. The hunters then called for help on the Trooper's radio.

Appellant testified at the trial, at the time of the shooting, he was under the influence of drugs and that he woke to find a "vision"--an arm that was pulling him,--so he rolled to the floor of the car where he got his single action gun and fired repeatedly at the vision. After the shooting, it was found that Appellant's gun contained six empty cartridges, while all six cartridges in Tropper Smiths' pistol had also been fired."

The above synopsis is totally consistent with the recollection of the

undersigned as trial judge in the trial of Carl Ray Songer for the murder of Florida Highway Patrol Trooper Ronald G. Smith.

CASE CHRONOLOGY

The case chronology begins over eleven years ago when the defendant was charged on December 23, 1973 with First Degree Murder and convicted of that offense on February 27, 1974, and the death sentence imposed on him on February 28 of that year upon the recommendation of the jury.

The Supreme Court of Florida affirmed defendant's judgment and sentence in Songer v. State, 322 So.2d 481 (1975)("Songer I"). The Supreme Court of the United States, however, in Songer v. Florida, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977), vacated the sentence and remanded for reconsideration in light of the ruling in Gardner v. Florida, 430

U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). On remand for resentencing the trial judge found that Gardner had been complied with and reimposed the death sentence on August 17, 1977. The Supreme Court of Florida again affirmed the sentence of death in Songer v. State, 365 So.2d 696 (Fla. 1978)("Songer II"), and the United States Supreme Court denied certiorari in Songer v. Florida, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

In September 1980, the Governor of Florida signed a death warrant ordering defendant's execution during the week of October 3, 1980. Pursuant to Rule 3.850, Fla.R.Crim.P., defendant filed a Motion to Vacate Judgment and Death Sentence on September 24, 1980. On September 30, 1980, the trial judge denied defendant's Rule 3.850 motion. Defendant's execution,

however, was stayed by the Florida Supreme Court on September 26, 1980, upon the filing by defendant and 122 other death-row inmates of an application for extraordinary relief and petition for writ of habeas corpus, which was subsequently denied in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

The trial court's denial of defendant's Rule 3.850 motion was affirmed by the Supreme Court of Florida on September 9, 1982, Songer v. State, 419 So.2d 1044 (Fla. 1982)("Songer III"). On November 5, 1982 the Governor of Florida signed a second death warrant and defendant's execution was scheduled for December 7, 1982. On November 22, 1982, defendant filed in the Florida Supreme Court a petition for writ of habeas corpus, which was denied in Songer v.

Wainwright, 423 So.2d 355 (Fla. 1982)("Songer IV").

On December 1, 1982, defendant filed in the U.S. District Court his petition for Writ of Habeas Corpus and an application for Stay of Execution. On December 3, 1982, that Court was compelled to grant a stay of execution pursuant to the mandate of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") in Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982) (error for district court to deny a stay of execution when a constitutional issue raised by defendant is being considered by a federal appellate court). Because the issue underlying the order of stay was resolved by the Eleventh Circuit, see Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) (Florida Supreme Court did not improperly use nonrecord material in

appellate review of death-row inmates' cases), that Court then dissolved its stay entered on December 3, 1982, and denied the petition for habeas corpus relief on July 14, 1983, Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983)(Melton, J.)

On appeal from the denial of the habeas corpus, the U.S. Court of Appeals for the Eleventh Circuit affirmed on May 18, 1984 Songer v. Wainwright, 738 F.2d 471 (11th Cir. 1984). Rehearing and Rehearing En Banc was denied on June 26, 1984.

A petition for Writ of Certiorari was denied on January 7, 1985, Songer v. Wainwright, ___U.S.___, 53, 53 U.S.L.W. 3480 Defendant has a pending motion in the Eleventh Circuit Court of Appeals to recall its mandate in light of its decision on January 11, 1985 to review en banc another case, allegedly involving issues pertinent to his case.

On January 10, 1985 a third death warrant was signed by the Governor of Florida and his execution scheduled for February 5, 1985; and on January 24, 1985 Defendant filed his second Motion for Post-Conviction Relief with this Court.

FINDINGS AS TO DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF AND TO VACATE SENTENCE

Defendant's second Motion to Vacate and Amendment thereto is dismissed as all issues raised therein except the two issues hereafter identified, under authority of Rule 3.850 Fla.R.Crim.P., for the reason that all such issues have been disposed of as is shown by the above Case Chronology and also the following orders:

(a) Order entered herein on the 30th day of September 1980 denying Defendant's first Motion to Vacate, which Order has been affirmed in appellate proceedings cited in that Case Chronology.

(b) Order dated July 14, 1983 denying Defendant's Petition for

Habeas Corpus (which raised the same issues dismissed herein) entered by the U.S. District Court, which Order has been affirmed by appellate proceedings. That Order, together with appellate affirmation is shown in said Case Chronology.

The two remaining issues:

1. The retroactive effect, if any, that the case of Lockett v. Ohio, 438 U.S. 586, 571 L.Ed. 973, 98 S.Ct. 2954 (1978) has on Defendant's 1974 Penalty Proceeding of his trial and the Jury Instructions given during that part of the trial, and

2. Defendant's Eighth Amendment claim as to his prolonged almost eleven years of incarceration on Death Row.

Each of these issues will now be determined and as to the first issue, the undersigned.

(1) Takes Judicial Notice that defendant was tried under the provisions of the then existing Penalty Proceeding, to wit: Chapter 72-724, Section 9, Laws of Florida, copy of such law being attached. Also, that said law became effective December 8, 1972 and had been law only approximately fourteen (14) months at the time of the Songer trial.

(2) Did extensive research prior to such trial as to the intent and purpose of such "new" law but there were no published Florida Supreme Court cases interpreting said law, nor had the Supreme Court, at that time, promulgated any rules concerning the Penalty Proceeding as it has since done. Therefore, the undersigned determined that the Penalty Proceeding Jury Instructions should "track the statute" (Chapter 72-724, Laws of Florida) and limited the aggravating

circumstances to those enumerated by that statute; and placed the normally mandatory connotation on the word "shall" in all places where such word was used in such statute, subject to the following provision of that statute, to wit:

> (1) "... In the proceeding, evidence may be presented as to any matter that the court deems relevent to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of chis section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; ... The state and the

defendant or his counsel shall be permitted to present argument for or against sentence of death" (Above underlining by the Court)

(3) Subsequent charges in the Penalty Proceeding have been made in both statutory and case law; and also the Florida Supreme Court has promulgated Standard Jury Instructions covering the subject. One of the latter Mitigating Instructions so adopted is as follows:

"Any aspect of the Defendant's character or record and any other circumstance of the offense." This Instruction would appear to cover the requirement of Lockett which states at page 990 of 57 L.Ed.2d:

"... we conclude that the Eighth and Fourteenth Amendments

> require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"

The evidence and testimony proffered at the Post-Conviction hearing indicated there was evidence at the time of the Songer trial that could be presented as mitigating circumstances under present case and statutory law and Florida Supreme Court Standard Instructions.

Lockett did not make its requirement retroactive nor has the Florida Supreme Court, by case law or Rule, made such requirement retroactive. However, it

should be noted that the U.S. Supreme Court has in subsequent cases applied Lockett to vacate death (see Jordan v. Arizona, et al. 438 U.S. 911) but that Court has not SPECIFICALLY ruled on Florida's Penalty Proceeding as it existed under Chapter 72-724, Laws of Florida.

Accordingly, the undersigned finds that there were no unconstitutional limitations on mitigating evidence at the time of the Songer trial, and therefore, denies Defendant's request for relief on that issue.

As to the second issue, i.e.

The Eighth Amendment Relief pertaining to cruel and unusual punishment. The undersigned

(1) Takes Judicial Notice of the Rules and Regulations governing Death Row inmates at Florida State Prison, copies of which were filed at the

Post-Conviction Relief Hearing on January 25, 1985.

(2) Takes Judicial Notice that Defendant has been confined to Death Row at Florida State Prison during the almost eleven (11) years of appeals process.

(3) Considered Defendant's brief but courteous and refrained testimony at the Post-Conviction Hearing as to some of his experiences on Death Row. But determines that Defendant's Eighth Amendment claim for relief does not APPEAR to be within the scope of Rule 3.850: but that if same is contemplated by said Rule additional evidence would be required by the undersigned before a proper ruling could be made as to that issue, and

Accordingly, the undersigned denies the relief as to the allegations of cruel and unusual punishment under the Eighth Amendment.

CONCLUSIONS AND ORDER

Based on the above the undersigned concludes that the Motion for Post-Conviction Relief is legally insufficient and that the Application for Stay is without merit, and it is therefore

ORDERED AS FOLLOWS;

1. That the Motion for Post-Conviction Relief is Denied.

2. That the Application for Stay of Execution is Denied.

DONE AND ORDERED this 27th day of January, 1985.

_____

John W. Booth, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Howard H. Babb, Jr., Public Defender Fifth Judicial Circuit, Post Office Box 1197, Tavares, Florida 32778; S. Ray Gill, State Attorney Fifth Judicial Circuit, County Office Building, 19 NW Pine Avenue, 3rd Floor, Ocala, Florida 32670, Peggy Quince, Assistant Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602; Richard Dugger, Superintendent of Florida State Prison, Post Office Box 747, Starke, Florida 32091; Joseph Jordan, P.A., The Barrister's Building, Suite 1-B, 1615 Forum Place, West Palm Beach, Florida 33401; Sid White, Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32304; and Carl Ray Songer, Florida State Prison, Post Office Box 747, Starke, Florida 32091 by U.S. Mail this _____ day of January, 1985.

Honorable Walt Connor
Clerk of the Circuit Court

By: _____
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-3500

CARL RAY SONGER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, etc., and
RICHARD L. DUGGER, etc.,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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Before RONEY and VANCE, Circuit Judges, and SIMPSON, Senior Circuit Judge.

RONEY, Circuit Judge:

In 1974, Carl Ray Songer was convicted of the first-degree murder of a Florida Highway Patrolman and sentenced to death. The Florida Supreme Court affirmed in Songer v. State, 322 So.2d 481 (Fla. 1975) ("Songer I"), but the United States Supreme Court subsequently vacated and remanded for reconsideration of the sentence in light of Gardner v. Florida, 430 U.S. 952 (1977). The death penalty was reimposed by the trial judge in August 1977, and reaffirmed by the Florida Supreme Court in Songer v. State, 365 So.2d 696 (Fla. 1978) ("Songer II"), cert. denied, 441 U.S. 956 (1979).

Following the issuance of the first of two death warrants in September of

1980, Songer filed a motion to vacate judgment and death sentence pursuant to Fla. R. Crim. P. 3.850. The motion was denied after a hearing before the trial court, and the Florida Supreme Court affirmed the denial in Songer v. State, 419 So.2d 1044 (Fla. 1982) ("Songer III"). When the second death warrant was issued in November of 1982, Songer filed a habeas corpus petition in the Florida Supreme Court. The petition was denied in Songer v. Wainwright, 423 So.2d 355 (Fla. 1982) ("Songer IV"), and a federal habeas corpus petition was filed by the defendant. The district court denied relief following a hearing, Songer v. Wainwright, 571 F.Supp. 1284 (M.D. Fla. 1983), and this appeal followed.

On appeal, Songer's argument focuses upon the following points: (1) ineffective assistance of trial counsel, including: failure to investigate

alternative defenses, refusal to develop testimony Songer requested, failure to investigate defendant's background for mitigating factors in preparation for sentencing, failure to prepare for cross-examination of witnesses, failure to present a final argument at the penalty phase, and failure to object at the sentencing hearing when defendant's evidence in mitigation was presented prior to the state's case; (2) violation of defendant's right to procedural due process at the penalty phase due to: defendant's evidence being presented prior to the state's case, jury instructions which improperly limited the jury's consideration of mitigating circumstances and which did not specify that the state bore the burden of proving that the defendant should receive the death penalty, failure to instruct the jury that aggravating curcumstances must be

established beyond a reasonable doubt, the application of an unconstitutionally vague aggravating circumstance, and the lack of a transcript of the charge conference; (3) ineffective assistance of counsel on appeal, including: failure to raise the issue of the lack of a charge conference transcript, and failure to raise the due process claim regarding the order of the parties' presentations at the penalty phase; and (4) a Gardner violation consisting of trial counsel's failure to review the pre-sentence investigation report with the defendant before sentencing, and the trial court's denial of Songer's motions to produce witnesses at the re-sentencing hearing. We affirm.

The killing occurred on December 23, 1973, when Trooper Ronald G. Smith of the Florida Highway Patrol stopped to check a vehicle parked on a gravel road about fifty yards from the highway near Crystal

River, in Citrus County, Florida. Two hunters who were about thirty feet behind Officer Smith saw Smith approach the car, talk with Ronald Jones, defendant's companion, search Jones at the rear of the vehicle, and return to the car with his hand on his pistol. He leaned into the car, and a fusillade of shots ensued. Trooper Smith died from loss of blood resulting from four bullet wounds in the upper body and a wound in one knee. The defendant came out of the back seat of the automobile, shot once toward the hunters, jumped back into the car, and with Jones driving, attempted to leave the scene.

Songer testified at trial that at the time of the shooting, he was under the influence of drugs and that he woke to find a "vision" - an arm that was pulling him - so he rolled to the floor of the car where he got his single action gun and

fired repeatedly at the vision. After the shooting, Songer's gun contained six empty cartridges.[1]

At trial, Songer's chief defense was lack of premeditation. Songer's principal argument on this collateral attack appeal is that his trial counsel was ineffective at the guilt/innocence stage because he refused to investigate the viability of a self-defense claim. Specifically, defendant contends that his trial attorney rejected without any investigation the defense that because Songer had regularly injected methamphetamine in the months before the killing, he was under the influence of the drug at the time of the shooting, so that when Officer Smith leaned over him, he saw only a huge silver

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[1] A more detailed version of the circumstances surrounding the killing is set out in Songer I, 322 So.2d at 482-83.

pistol at which he fired in an effort to protect himself. This defense would have required extensive testimony about defendant's past use of drugs. Defendant's trial counsel stated that he did not raise the defense because he believed that such evidence of drug use would prejudice his client in the minds of the jurors.

Both the state trial court and the federal district court considered defendant's ineffective assistance of counsel claims in evidentiary hearings. The district court found as a fact that Songer's trial counsel could reasonably have determined that a jury would find the defenses of lack of premeditation and self-defense inconsistent, and that the facts that would need to be developed for a self-defense theory would be prejudicial. The court noted that by

relying upon the theory that he chose, defense counsel was able to utilize the tactical advantage of presenting the first opening and the final closing arguments to the jury. Had he presented the proposed self-defense claim, he would have been compelled to call additional witnesses, thereby forfeiting this advantage.

The district court concluded that this case may be categorized as one in which counsel "fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial." 571 F.Supp. at 1389-90 (citing Washington v. Strickland, 693 F.2d 1243, 1254-56 (5th Cir. Unit B 1983) (en banc), cert. granted, 77 L.Ed.2d 1332 (1983)). Songer's trial counsel made a tactical decision to rely on the fact that the

state's evidence would not be sufficient to prove premeditation, rather than proceeding on a theory of self-defense. A decision such as this one falls into the "amorphous zone known as 'trial strategy' or 'judgment calls'" and cannot form the basis for claims of ineffective assistance of counsel. Jones v. Estelle, 632 F.2d 490, 492 (5th Cir. 1980), cert. denied, 451 U.S. 916 (1981). Further investigation by counsel would not have altered the conclusion, based on counsel's many years of criminal litigation experience, that jury prejudice would result from the presentation of extensive proof of defendant's long-term drug use.

The remainder of Songer's claims regarding the ineffectiveness of his trial counsel have been carefully reviewed by state courts and by the federal district court, and found to be without merit. The

factual findings of the district court in this regard were not clearly erroneous.[2]

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[2] Specifically, the district court found the following facts:

a. Counsel's strategic choice to pursue the "lack of premeditation" defense was reasonable.

b. Counsel devoted sufficient time to the case to insure an adequate defense and familiarize himself with the facts and applicable law.

c. There was evidence of bullet angles in the record; therefore, argument based on that evidence was proper.

d. There were not repeated references to appellant's alias, and that alias was explained.

e. The failure to object to argument of the victim's age of 26 was not substantial.

f. The exclusion of venirewoman Lucy Milton was proper; she made it clear she could not bring back a verdict of guilty.

g. A reading of complete instructions indicates the arguably erroneous instruction on circumstantial evidence could not have misled the jury.

h. The character mitigating evidence would have been a general affirmation of good behavior as a child and young adult offered by family and friends; such evidence was unlikely to make a difference.

i. Counsel did discuss character witnesses with the defendant, but counsel rejected their use.

See Pullman-Standard v. Swint, 456 U.S. 272 (182). Songer primarily alleges that counsel failed to adequately prepare for the guilt/innocence and sentencing proceedings. This is unpersuasive in light of trial counsel's testimony in the Florida 3.850 hearing that he reviewed all the physical evidence in the prosecutor's possession, including the witnesses' statements and the police and lab reports, that he discussed the state's evidence with his client before trial, and that he was not surprised by any evidence

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j. There was testimony elicited at the penalty phase concerning the nonviolent nature of appellant's prior offenses.

k. There was no reason to call the Matthews in the penalty phase since counsel had abandoned the "drug defense."

l. The absence of drug evidence in the penalty phase was strategic.

m. The waiver of final argument at the penalty phase was strategic in that the prosecutor likewise waived final argument.

n. Appellant's resentencing was conducted within the scope of the Gardner remand.

presented at trial. Defendant's claim is further undermined by the quality of counsel's performance throughout the proceedings, as reflected in the record. Defendant has failed to meet his burden of demonstrating by a preponderance of the evidence that his counsel was ineffective, either at trial or on appeal. See Washington v. Strickland, 693 F.2d at 1250; United States v. Killian, 639 F.2d 206, 210 (5th Cir. 1981).

Defendant's second major claim on appeal is that he was denied constitutional procedural due process in the penalty phase of his trial. Specifically, he asserts that he is entitled to resentencing by a different jury because he testified in the sentencing hearing before the state presented its witness and the judge did not properly instruct the jury: (1) that

aggravating circumstances must be proved by the state beyond a reasonable doubt, (2) that the state has the burden of showing that aggravating circumstances outweigh mitigating circumstances (3) that mercy may be recommended by the jury even if aggravating circumstances are found; and (4) that the scope of mitigating circumstances that could be considered was not limited to those listed in the statute.

At the sentencing hearing, the defense presented its testimony in mitigation first. Songer testified regarding his prior criminal record, his non-violent escape from Oklahoma, and his age. The state's witness, an official from the Oklahoma work release program from which Songer escaped, then testified. Both parties waived argument after the testimony was presented.

The district court properly found that the errors alleged do not render Songer's sentence constitutionally defective. That defendant presented his mitigation case before the state presented its witness did not unconstitutionally shift the burden of proof to defendant. As the Florida Supreme Court noted in Songer IV, 423 So.2d at 356, "[m]itigating circumstances are offered during the penalty phase to show the totality of the circumstances. The evidence is offered to show that the circumstances warrant less than the penalty of death. There is no improper shifting of the burden of persuasion." See also Jackson v. Wainwright, 421 So.2d 1385, 1389 (Fla. 1982).

As for the allegedly flawed instructions to the jury regarding aggravating and mitigating circumstances,

defendant failed to object to the trial court's instruction at the time they were issued as required by Fla. R. Crim. P. 3.390(d). In fact, defense counsel specifically indicated that he had no objection to the instruction. Defendant likewise failed to raise these claims on direct appeal. When this claim was first presented on appeal from the denial of defendant's motion under Fla. R. Crim. P. 3.850, the Florida Supreme Court expressly held that the error alleged was not fundamental, and was therefore not properly reviewable because no objection had been lodged at the hearing. Songer III, 419 So.2d 1044.

Without objection below, a defendant is entitled to review of a claim of error in the instruction to the jury only if he can show cause for his failure to object, and actual prejudice resulting therefrom.

Engle v. Isaac, 456 U.S. 107, 129 (1982). The district court properly held that because defendant alleged neither cause nor prejudice, he is now barred from raising these claims.

Finally, the instruction given by the trial court as to consideration of aggravating and mitigating circumstances was not objected to at the hearing, and is the same type of instruction upheld in Ford v. Strickland, 696 F.2d at 804, 812, (11th Cir. 1983), where the Court noted that:

> the trial court read the statute as written, setting forth the entire list of statutory mitigating circumstances, which statute omits the word "only." The Supreme Court has recognized the Florida Statute does not limit a jury's consideration of mitigating circumstances to those listed in the statute.

(citations omitted). See also Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.

1978), cert. denied, 440 U.S. 976 (1979); Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983).

The district court properly found that the failure to record the charge conference did not amount to a constitutional deprivation. Defendant has failed to demonstrate that the lack of a transcript of this proceeding rendered the record presented to the reviewing courts "so deficient that it would be impossible for [them] to perform the function required of [them] under Gregg, or would create 'a substantial risk that the penalty is being inflicted in an arbitrary and capricious manner,'" or that he was "actually prejudiced" by the absence of the transcript. Stephens v. Zant, 631 F.2d 397, 403 (5th Cir. 1980), modified on other grounds, 648 F.2d 446 (1981), cert. denied, 454 U.S. 1035 (1983) (citations omitted).

Songer contends that the rule in Gardner v. Florida, 430 U.S. 349 (1977), which requires that a defendant be given an opportunity to explain or rebut information which the court may rely upon in sentencing, was violated because his trial counsel did not review his pre-sentence investigation with him "at any meaningful time," and because the trial court denied his motions to produce witnesses in the resentencing proceeding which followed the Supreme Court's remand of Songer I. See Songer II, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). This claim has been reviewed and rejected by both the Florida Supreme Court and the federal district court. We affirm the holding and analysis of the district court on this issue without further discussion.

Defendant adopts, without extensive

argument, all of the numerous additional claims raised in his habeas corpus petition. These claims were rejected by the district court in a thorough and carefully reasoned opinion. 571 F.Supp. at 1384. Defendant properly refrains from repetitious argument on these points, as there are no contentions which have not been adequately addressed in prior proceedings and properly denied. For the purpose of reflecting for the record all of the claims considered by the district court and asserted on this appeal, we attach to the manuscript opinion as an Appendix, which is not to be published, a copy of the relevant portion of the Petition for Writ of Habeas Corpus filed with the district court.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CARL RAY SONGER,

Petitioner,

vs. Case No. 82-230-Civ-Oc-M

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and RICHARD L. DUGGER, Superintendent, Florida State Prison, Starke, Florida

Respondents.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

This cause came before the Court on a petition for writ of habeas corpus, filed on December 1, 1982, by CARL RAY SONGER, a death-row inmate at Florida State Prison. Respondents filed their response to the petition on December 21, 1982, and an evidentiary hearing on this matter was conducted on February 10, 1983. After careful and extensive review of the entire record herein, and after hearing argument by counsel for the respective parties, the Court is of the opinion that the petition for writ of habeas corpus should be denied.

PROCEDURAL HISTORY

Like so many death-row inmates, petitioner has become intimately familiar with the appellate process--at both the state and federal levels. The procedural history of this case is quite long,

spanning over nine years. On December 23, 1973, petitioner was charged with the first-degree murder of Highway Patrolman Ronald Smith on a rural road in Citrus County, Florida. The trial was transferred to Osceola County, Florida, and petitioner was convicted of first-degree murder on February 27, 1974. The jury recommended the imposition of the death sentence, and the trial judge imposed such sentence on February 28, 1974. The Supreme Court of Florida affirmed petitioner's judgment and sentence in Songer v. State, 322 So.2d 481 (Fla. 1975) ("Songer I"). The Supreme Court of the United States, however, in Songer v. Florida, 430 U.S. 952 (1977), vacated the sentence and remanded for reconsideration in light of the ruling in Gardner v. Florida, 430 U.S. 349 (1977). On remand for resentencng, the trial judge

reimposed the death sentence on August 17, 1977. The Supreme Court of Florida again affirmed the sentence of death in Songer v. State, 365 So.2d 696 (Fla. 1978) ("Songer II"), and the United States Supreme Court denied certiorari in Songer v. Florida, 441 U.S. 956 (1979).

In September 1980, the Governor of Florida signed a death warrant ordering petitioner's execution during the week of October 3, 1980. Pursuant to Rule 3.850, Fla.R.Crim.P., petitioner filed a Motion to Vacate Judgment and Death Sentence on September 24, 1980. On September 30, 1980, the trial judge denied petitioner's Rule 3.850 motion. Petitioner's execution, however, was stayed by the Florida Supreme Court on September 26, 1980, upon the filing by petitioner and 122 other death-row inmates of an application for extraordinary relief and

petition for writ of habeas corpus, which was subsequently denied in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

The trial court's denial of petitioner's Rule 3.850 motion was affirmed by the Supreme Court of Florida on September 9, 1982. Songer v. State, 419 So.2d 1044 (Fla. 1982) ("Songer III"). On November 5, 1982, the Governor of Florida signed a second death warrant and petitioner's execution was scheduled for December 7, 1982. On November 22, 1982, petitioner filed in the Florida Supreme Court a petition for writ of habeas corpus, which was denied in Songer v. Wainwright, 423 So.2d 355 (Fla. 1982) ("Songer IV").

On December 1, 1982, petitioner filed in this Court his petition for writ of habeas corpus and an application for stay

of execution. On December 3, 1982, this Court was compelled to grant a stay of execution pursuant to the mandate of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") in Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982) (error for district court to deny a stay of execution when a constitutional issue raised by petitioner is being considered by a federal appellate court). Because the issue underlying the order of stay has been resolved by the Eleventh Circuit, see Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) (Florida Supreme Court did not improperly use non record material in appellate review of death-row inmates' cases), the Court will now dissolve its stay entered on December 3, 1982, and proceed to review all of the grounds alleged by petitioner for habeas corpus relief.

GROUNDS FOR RELIEF

I. Ineffective Assistance of Trial Counsel at Guilt/Innocence Stage.

Petitioner's first ground for habeas corpus relief is his claim that he was denied his right to effective assistance of counsel at the guilt/innocence stage of his capital trial in violation of the sixth and fourteenth amendments to the United States Constitution. Petitioner presented this issue before the state trial court in his motion filed pursuant to Rule 3.850, Fla.R.Crim.P. ("3.850 Hearing"). The trial court denied petitioner relief, and the Supreme Court of Florida affirmed the trial court's decision. Songer III. Because petitioner has exhausted his state remedies, this issue is properly before the Court for resolution.

Under the sixth amendment, a criminal defendant is entitled to an attorney

reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances. Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. 1982) (Unite B en banc), cert. granted, 51 U.S.L.W. 3865 (U.S. June 7, 1983) (No. 82-1554); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974). This standard does not guarantee errorless counsel, "nor may counsel's performance be judged by benefit of hindsight." Proffitt v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982). In order to prevail on a claim of ineffective assistance of counsel, petitioner must prove his entitlement to relief by a preponderance of the evidence. Washington, 693 F.2d at 1250; United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied, 451 U.S. 1021 (1981).

In support of his claim of

ineffective assistance of counsel, petitioner outlines several alleged deficiencies of his trial counsel's performance at the guilt/innocence stage of his trial. The Court, after careful consideration of the record herein, cannot accept petitioner's conclusion that he was denied his right to effective assistance of counsel at the guilt/innocence stage of his trial.

First, petitioner contends that trial counsel, C. John Coniglio ("Coniglio"), failed to prepare adequately for trial. The general principles governing any claim of ineffective assistance of counsel based on inadequate pretrial investigation were enunciated in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc), cert. granted, 51 U.S.L.W. 3865 (U.S. June 7, 1983) (No. 82-1554). Recognizing that Washington provides the

framework for analysis of this claim, petitioner argues that the case sub judice is a "category I type case" under Washington. Evidentiary Hearing of February 10, 1983 ("EH"), at 110-13. Petitioner contends that there was only one plausible line of defense available to him at his trial: self-defense. See Petitioner's Proposed Findings of Facts and Conclusions of Law at 12; EH at 110-11. Petitioner argues that had Coniglio only investigated petitioner's allegedly long-term use of certain drugs, and the behavioral and psychological effects such drugs allegedly had upon petitioner, Coniglio could have formulated and presented to the jury a credible self-defense theory. Petitioner contends that under such a self-defense theory, Coniglio could have presented evidence of drug usage to support the argument that

petitioner, whose perceptions were affected by long-term drug usage, had reasonable grounds to believe that he was threatened with imminent danger of grievous bodily harm when the deceased Highway Patrolman drew his pistol. The Court rejects petitioner's conclusion that Coniglio was ineffective for his failure to investigate this potential line of defense, as petitioner begins his argument with a faulty premise. Petitioner would lead this Court to believe that there was only one plausible line of defense available, and therefore, Coniglio had a duty to make a reasonably substantial investigation into that one line of defense before proceeding to trial. Washington v. Strickland, 693 F.2d at 1252-53 (counsel must conduct substantial investigation into the one plausible line of defense in the case). The Court in

Washington, however, recognized that trial counsel in many cases may have more than one plausible line of defense from which to choose. Id. at 1253-58. The Court is of the opinion that the case sub judice is one of such cases.[1]

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[1] There could conceivably have been three plausible lines of defense available to Coniglio in defending petitioner against a first-degree murder charge in this case: (1) self-defense (in conjunction with the presentation of evidence of the effects of long-term drug usage); (2) insufficiency of evidence to prove premeditation; and (3) voluntary drug intoxication. Unlike self-defense, which would have made the homicide justifiable, see State v. Frazier, 407 So.2d 1087, 1089 (Fla. Dist. Ct. App. 1982), the defense of voluntary intoxication would only operate to mitigate the degree of the unlawful homicide. Coggins v. State, 101 So.2d 400, 402 (Fla. Dist. Ct. App. 1958) (intoxication may eliminate premeditation which is necessary element of first-degree murder); see Russell v. State, 373 So.2d 97, 98 (Fla. Dist. Ct. App. 1979) (voluntary intoxication is defense to specific intent crimes). It is highly doubtful, however, whether the defense of voluntary drug intoxication would have been a successful line of defense, as petitioner had not ingested any drugs

This case falls within that line of cases, designated as a type-IV case in Washington, where counsel "fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial." Id. at 1254-56. In rejecting self-defense or voluntary drug intoxication as theories of his defense, Coniglio made the strategic decision to

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(other than marijuana the night before the shooting) since leaving Oklahoma approximately three days before the shooting incident. Rule 3.850 Hearing Transcript ("3.850 Hearing") at 41-42, 57-58; Trial Transcript ("TT") at 348-49. In any event, whether there were two or three plausible lines of defense available is of little mement; the important point is that there was more than one plausible line of defense available, thereby affording trial counsel an opportunity to make a strategic choice based upon his "professional assumptions regarding the prospects for success offered by the various lines." Washington v. Strickland, 693 F.2d at 1255.

pursue the line of defense of attacking the sufficiency of the circumstantial evidence presented by the State to prove premeditation.

The fact that Coniglio did not conduct a substantial investigation into any line of defense other than the one that he presented at trial does not mean that Coniglio failed to render reasonably effective assistance of counsel.[2] Id. at 1254-58. The law is clear that "counsel need not investigate lines of defenses that he has chosen not to employ

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2 The court in Washington noted that when there is more than one plausible line of defense available, trial counsel should "ideally perform a substantial investigation into each line before making a strategic decision as to which lines he will employ at trial. The ideal,...is an aspiration to which all defense counsel should strive. It does not, however, represent the constitutional minimum for reasonably effective assistance of counsel." Id. at 1254 (emphasis added).

at trial," provided counsel's strategy is: (1) based on reasonable assumptions given the totality of the circumstances, and (2) represents a reasonable choice based upon those assumptions. Id. at 1255. The Court is convinced that Coniglio's strategic decision to pursue the line of defense that he did at trial was a reasonable choice based on reasonable assumptions.

It is incumbent upon a district court to determine, as a question of fact, whether trial counsel's strategic choice based upon a set of assumptions is reasonable. Id. at 1256 n.23. The Court in Washington, in order to provide district courts with guidance in making this reasonableness determination, outlined a few of the factors that should be examined, none of which is individually determinative. Id. One factor a Court should consider is counsel's trial

experience. In this regard, the Court notes that Coniglio had been practicing law for seventeen years and had been handling 200 to 300 criminal cases per year, 75% of which involved felony offenses. Moreover, Coniglio had previously represented several defendants charged with first-degree murder. 3.850 Hearing at 67, 91. With this extensive criminal experience, it is reasonable to conclude that Coniglio had formed "a more accurate picture of which lines of defense...[were] most likely to succeed." Washington, 693 F.2d at 1256 n.23.

A second factor a court should consider is whether the line of defense actually pursued by trial counsel was inconsistent with the line of defense that was rejected. Id. Petitioner insists that the theory of self-defense should have been pursued by Coniglio. Coniglio,

however, chose instead to rely upon the defense strategy of attacking the state's attempt to prove premeditation through the use of circumstantial evidence, which Congilio contended was woefully insufficient to prove premeditation beyond a reasonable doubt. Although there may be some doubt whether these two defenses are legally inconsistent, Coniglio could have reasonably determined that a jury would perceive the two defenses to be inconsistent. See Gray v. Lucas, 677 F.2d 1089, 1094 (5th Cir. 1982).

Another relevant factor the Court should examine is the possible prejudice that might have foreseeably resulted from the available lines of defense. Under petitioner's proposed self-defense theory, it would have been necessary to adduce extensive testimony concerning petitioner's long-term drug usage and its

potential disorienting effects. See EH at 111; 3.850 Hearing at 47. Coniglio, however, apparently believed that heavy reliance on extensive testimony concerning drugs could have evoked a significant amount of prejudice by the jury. See EH at 81. Thus, the possible prejudice resulting from the proposed self-defense theory was foreseeably more severe than that resulting from the defense Coniglio actually presented at trial (failure to prove premeditation).

Finally, the Court notes that Coniglio, by not presenting any witnesses other than petitioner in his case-in-chief, gained an important tactical advantage of both opening and closing final arguments to the jury. Coniglio would have forfeited this tactical advantage had he presented the proposed self-defense theory that

petitioner now presses upon the Court. In light of the preceding factors, the Court is convinced that Coniglio made a reasonable choice based upon reasonable assumptions when he rejected the uninvestigated self-defense theory in favor of the defense he actually pursued at trial, which was an attack on the sufficiency of the evidence adduced to prove the element of premeditation.

The Court's finding that Coniglio's strategic choice was reasonable does not end the Court's inquiry. After deciding upon a particular line of defense, trial counsel is obligated to conduct a substantial investigation into that chosen line of defense, which should include "an independent examination of the facts, circumstances, pleadings and laws involved." Washington, 693 F.2d at 1253 (quoting Rummel v. Estelle, 590 F.2d 103,

104 (5th Cir. 1979). The scope of such investigation must be "reasonable, though not necessarily exhaustive." Id.

In support of petitioner's argument that Coniglio failed to prepare adequately for trial, petitioner points out that Coniglio failed to take the deposition of any witness and also contends that he met with Coniglio on only three occasions prior to trial, which collectively lasted for no more than one hour. See 3.850 Hearing at 24. Contrary to petitioner's testimony, Coniglio testified at the 3.850 Hearing--and the trial court so found in its order denying the rule 3.850 motion--that petitioner consulted with Coniglio on may occasions prior to trial. See id. at 75. However, the number and length of conferences between client and attorney is not determinative of the question before the Court. Easter v.

Estelle, 609 F.2d 756, 759 (5th Cir. 1980) ("[B]revity of time spent in consultation, without more, does not establish that counsel was ineffective."). The focus of this Court's inquiry should be on whether Coniglio had "devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case." Id. The record herein reflects that Coniglio was so prepared. Taking advantage of the prosecutor's "Open File" policy in this case, Coniglio received and reviewed copies of all the witnesses' statements, police and laboratory reports, and all the physical evidence in the prosecutors's possession or control. See 3.850 Hearing at 71-72, 75, 105-06. Moreover, Coniglio testified that he and petitioner discussed prior to trial all of the evidence the state would present

against petitioner; Coniglio further testified that he was not surprised by any evidence presented at trial. Id. at 71, 75. After carefully reviewing the trial transcript of this case, the Court is left with a firm conviction that Coniglio's performance was reasonably effective. Coniglio's cross-examination of the State's witnesses, his numerous evidentiary objections raised, and his legal arguments presented to the trial court amply demonstrate that Coniglio was well versed in both the factual and legal aspects of petitioner's case. Therefore, the Court finds that petitioner's claim of ineffective assistance of counsel for Coniglio's alleged failure to prepare adequately for trial is without merit.[3]

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[3] Because petitioner has failed to show that Coniglio was ineffective, the Court need not reach the question of whether there was substantial prejudice. Washington, 693 F.2d at 1250.

A second alleged deficiency in Coniglio's performance at trial, petitioner argues, was Coniglio's failure to object to the prosecutor's argument to the jury of certain matters allegedly not in evidence. Petitioner first contends that Coniglio should have objected to the prosecutor's reference to the bullet angles of entry into the deceased's body. Petitioner argues that this matter was never put into evidence. The Court disagrees with petitioner. The angles of entry by the bullets into the deceased's body was placed into evidence through the testimony of pathologist Dr. Shutze. TT at 316-18.[4]

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[4] During direct examination of Dr. Shutze, the prosecutor attempted to elicit from Dr. Shutze his opinion on the body positions of the deceased and petitioner at the time of the shooting, at which time Coniglio objected. The trial court, sustaining Coniglio's objection, restricted Dr. Shutze's testimony to only the bullet angles of entry into the body. TT at 317.

Moreover, in his closing argument, Coniglio referred to these bullet angles of entry and pointed out to the jury some apparent inaccuracies in the prosecutor's recollection of the substance of Dr. Schutze's testimony. Id. at 389, 405-06. Therefore, the Court finds that petitioner's argument that this particular matter was not in evidence is without merit.

Petitioner next contends that Coniglio failed to object to the prosecutor's alleged repeated references to petitioner by an alias name allegedly used by petitioner. The Court finds no merit in petitioner's argument. There were no repeated references to petitioner by the alleged alias name; furthermore, use of the alleged alias name, i.e., Robert Berry, was fully explained by petitioner when he testified during cross-examination. TT at 360-61.

Petitioner also contends that Coniglio's failure to object to the prosecutor's comment to the jury concerning the victim's age (26) rendered Coniglio's assistance ineffective. While it may be true that the prosecutor's comment was improper, Coniglio's failure to object does not thereby translate into ineffective assistance of counsel. As discussed earlier, a criminal defendant is not constitutionally entitled to "errorless counsel," but rather is entitled to reasonably effective counsel. Proffitt v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982). In light of this standard, petitioner's claim of ineffectiveness is without merit. A review of the record indicates that Coniglio voiced numerous objections throughout the trial, many of which were sustained, and in general presented a

skillful and effective defense for petitioner. Petitioner has not only failed to show that Coniglio was ineffective but also has failed to show how this trial error caused actual and substantial disadvantage to his defense. See Washington, 693 F.2d at 1258-62.

Petitioner alleges Coniglio committed another trial error when Coniglio failed to object to the exclusion of venirewoman Lucy Milton. Petitioner claims that the exclusion of this venirewoman for cause was in violation of the mandate of Witherspoon v. Illinois, 391 U.S. 510 (1968). Petitioner's claim is without merit for two reasons. First, Coniglio may have made a tactical decision not to object to the exclusion of Ms. Milton because he did not want her on the jury for some reason other that the Witherspoon issue. Second, even if Coniglio had

objected, his objection would not have been well taken. Under Witherspoon, and its progeny, a venireman can be struck for cause when he is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." Burns v. Estelle, 592 F.2d 1297, 1299 (5th Cir. 1979) (quoting Witherspoon, 391 U.S. at 522 n.21). The court in Witherspoon further explained that a venireman may be excluded if he makes it "unmistakably clear" that his attitude toward the death penalty would prevent him "from making an impartial decision as to the defendant's guilt." Id. (emphasis in original). A review of the voir dire examination of Ms. Milton indicates clearly that she could not return a verdict of guilty, either in this case or in any capital death

case.[5]

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5 The voir dire examination of venirewoman Lucy Milton by the prosecutor went as follows:
Q. Do you believe in capital punishment where the law so provides:
A. Yes.

Q. And, if after you have listened to all the evidence if you have an abiding conviction to a moral certainty that this defendant is guilty, would you have any hesitation about finding him guilty, even though it could mean death?
A. I don't like to say death.

Q. That is what the law is, and I'm trying to find out if you are qualified or not, would you or could you do that if the evidence shows he is guilty beyond and to the exclusion of a reasonable doubt?
A. No, sir, I don't think so.

Q. In other words, would it make any difference whether it is this case or any case?
A. No, sir, it wouldn't make any difference which case.

Q. You could not vote guilty if there were a chance that he could receive death from that verdict, is that right?
A. That's right, I'm just weak on things like that.

Q. Is this a religious belief, or is it a personal belief, or what?
A.. It is just personal.

Consequently, the exclusion of Ms. Milton for cause was entirely proper. See Williams v. Maggio, 679 F.2d 381, 384-86 (5th Cir. 1982).

Petitioner next contends, as a final deficiency in Coniglio's performance at the guilt/innocence stage of his trial, that Coniglio should have objected to the trial court's giving of an instruction on circumstantial evidence to the jury. Petitioner cites Wilcox v. State, 258 So.2d 298 (Fla. Dist. Ct. App. 1972), to support his claim that the instruction given was improper. The Court in Wilcox was of the opinion that a portion of the circumstantial-evidence instruction, which was also given in the case sub judice, may have been inaccurate. Id. at 300. The

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Q. Well, then, we are not talking about this case, if it were any case, you would have to tell me the same thing, is that right?
A. That's right.
TT at 23-25

court in Wilcox, however, nevertheless held that such inaccuracy was not reversible error and affirmed the trial court. Id. at 300-01. The full instruction on circumstantial evidence given in Wilcox was essentially the same as that given in petitioner's case. See Id. at 299-300; TT at 424-25. In holding that such an arguably improper portion of a circumstantial-evidence instruction was not reversible error, the court in Wilcox stated: "[T]he material error found here, which was merely a portion of the circumstantial evidence instruction, which in turn was merely a portion of the full charge relating to the presumption of innocence and reasonable doubt, could not have misled the jury." Id. at 300-01. A review of the complete instructions given in petitioner's case leads this Court to a similar conclusion. Because petitioner

has failed to show how this error caused his defense actual and substantial disadvantage, see Washington, 693 F.2d at 1258-62, the Court need not reach the question of whether Coniglio was ineffective for his failure to object to the giving of this instruction.

II. Ineffective Assistance of Trial Counsel at Penalty State.

Petitioner argues that he was denied his right to the effective assistance of counsel at the penalty stage of his trial. Petitioner first attacks Coniglio's failure to properly develop mitigating circumstances. Petitioner asserts that had Coniglio spoken further with him, he would have been able to develop additional character testimony, including the testimony of petitioner's parents.

When counsel's trial strategy does not include mitigating character evidence,

counsel is not required to investigate such evidence. See Washington v. Strickland, 693 F.2d at 1251; Stanley v. Zant, 697 F.2d 955, 964 (11th Cir. 1983). In Stanley, although the extent of counsel's inquiry concerning character witnesses was unclear, counsel did explore the possibilities with Stanley and Stanley's mother. Similarly, Coniglio discussed the possibility of such witnesses with petitioner. Petitioner's father, however, Mr. Ray Songer--one of the main character witnesses petitioner claims Coniglio should have called to testify--indicated that his testimony would have been "generally supportive" and would merely have revealed whether his son was a good or bad person. EH at 82-83. Thus, like Stanley, "an investigation into character evidence would have revealed nothing more than general affirmations

from family members and friends that ... [petitioner] had been, at a time remote from the events giving rise to the charge, a basically good and responsible child and young adult." Id. Conigilio cannot therefore be faulted for failing to introduce such testimony.

This Court agrees with the Eleventh Circuit's analysis in Stanley of the interplay between character evidence and petitioner's claim of ineffective assistance of counsel.

> We cannot say that this evidence would have had no impact on the jury, nor can we say that a tactical decision to use such evidence would have been unreasonable... In the present case, counsel's failure to present character evidence at the mitigation phase did not deprive Stanley of his right to reasonable representation. Further, the record is silent as to counsel's perception of the strategic posture of the case. Neither party saw fit to call Stanley's trial counsel as a

witness at the state habeas hearing. We thus do not know ... why he elected not to pursue the character witness line of inquiry ... The absence of any evidence of counsel's strategy places this case in stark contrast to cases such as Washington v. Strickland. We decline to infer from such silence an absence of strategy...
.....

Effective counsel in a given case may consider the introduction of character evidence ... unlikely to make much difference ... His position in reaching these conclusions is strikingly more advantageous than that of a federal habeas court in speculating post hoc about his conclusions ...
.....

Whatever his reason, or lack thereof, it was not presented to the habeas court. In such situations "[c]ourts presume, in accordance with the general presumption of attorney competence, that counsel's actions are strategic."

Id. at 969-70 (quoting in part Washington v. Strickland, 693 F. 2d at 1257).

Like the factual setting in Stanley, although Coniglio discussed with petitioner the possibility of using particular character witnesses during the penalty phase, Coniglio rejected that idea. His motivation for rejecting that testimony is unclear. Petitioner testified that Coniglio believed that such witnesses would not aid petitioner's case. Assuming arguendo the truth of petitioner's statement, and assuming that it encompasses counsel's entire reason for not calling the character witnesses, Coniglio's conduct remains within Washington's standards for effective counsel. Effective counsel may reasonably believe that character witnesses will not make a difference in a particular case. See id. at 970. Petitioner's opinions concerning counsel's motivations, however, may be false, or only partially accurate.

Because Coniglio's motivations do not appear from his testimony at the 3.850 Hearing, and because both parties released Coniglio from his subpoena immediately prior to his testifying at the evidentiary hearing, see EH at 72-73, this Court may also presume, in accordance with Stanley and Washington, that counsel's decision not to call character witnesses was strategic. Moreover, this Court is also aware that:

> [n]o panel of the eleventh or fifth circuits has to date found ineffective counsel predicated on failure to call character witnesses at the penalty stage of a capital case. In fact, the cases strongly suggest that such an ineffectiveness claim would be difficult to sustain even apart from the additional requisite showing of prejudice.

Id. at 964. This Court will not impose an absolute requirement that counsel must introduce character witnesses at the penalty phase.

Furthermore, at the time of petitioner's trial in 1974, it was by no means clear that a defense attorney should introduce mitigating character evidence during the penalty phase. "Florida's capital sentencing statute was barely a year old at the time of appellant's trial, and the only Florida Supreme Court case addressing its constitutionality supported an interpretation of the statute as limiting the mitigating evidence that could be considered to that falling within the seven statutory factors." Proffitt v. Wainwright, 685 F.2d 1227, 1247-48 (11th Cir. 1982). Indeed, petitioner's trial counsel may have been acting under such an impression:

> Q: [W]hat sort of recollection do you have of discussing the sentencing procedure and the kind of evidence that Mr. Songer might present?

> A: [Coniglio]: The only recollection I have that was a new statute at that time, I don't know when it was enacted, I believe maybe a year before the trial date, and going over the statutory grounds with him for aggravating circumstances and mitigating circumstances, and what would be available to us under the statutory language and what would be against us under the statutory langauge.

3.850 Hearing at 62. Thus, it is quite possible that Coniglio may have been laboring under the reasonable, but mistaken, belief that he could not introduce any nonstatutory mitigating factors. As a result, this Court is of the opinion that counsel's failure to introduce general character evidence did not deprive petitioner of effective assistance of counsel.

Petitioner also argues that other "specific factors ... would have been available" to petitioner's counsel, "if he

had performed adequately." These factors include petitioner's passive nature and the lack of prior violent crimes, his meager education and impoverished background, and testimony from a couple named Matthews who allegedly would have testified to petitioner's prior drug usage. First, Coniglio did elicit testimony from petitioner during the penalty phase that all of petitioner's previous crimes were nonviolent. See TT at 433. Second, petitioner has not developed evidence of an allegedly poor education or impoverished background. In addition, assuming such evidence existed, Coniglio may have failed to introduce such evidence for the reasons articulated above, for which he cannot be constitutionally faulted. Third, Coniglio indicated that he had deliberately abandoned the "drug defense," at both the

guilt/inocence stage and the penalty phase. See 3.850 Hearing at 27, 81, 111; see also EH at 81. Consequently, there was no reason to have the Matthews testify about petitioner's drug usage.

Similarly, there was no need, as petitioner contends, to thoroughly inspect alleged drug-related items taken from petitioner's car for two reasons. First, because the state maintained an "open file" in this case, see 3.850 Hearing at 64, 105-06, Coniglio's failure to formally demand exculpatory evidence from the state would apparently have been a useless exercise. Second, even if such allegedly exculpatory evidence did exist, Coniglio's posttrial strategy did not inlcude the use of such evidence. Petitioner's father testified that Coniglio's decision to forego testimony during the penalty phase concerning petitioner's drug use was

strategic: "[Coniglio] said that if you mentioned dope down here they will hate it, and it is best not to bring it up." EH at 81. Indeed, petitioner's present counsel admitted that Coniglio, who had practiced primarily criminal law in the geographic area for seventeen (17) years, perceived a certain prejudice against drugs among the local community in which petitioner was tried. See EH at 111; cf. Foster v. Strickland, No. 81-5734, slip. op. at 3738 (11th Cir. June 27, 1983) (counsel not ineffective when decision to present mitigating evidence in particular manner based upon years of criminal practice in particular region). The Florida Supreme Court agreed with Coniglio's analysis: "[A]ppellant's trial counsel avoided such testimony for tactical reasons, [and] obviously did not believe tht a voluntary intoxication

defense could be effective ..." Songer III, 419 So.2d at 1047. This type of "historical fact finding" is entitled to a presumption of correctness under 28 U.S.C. §2254(d) (1976), unless petitioner falls within one of that sections's enumerated exceptions. Thomas v. Zant, 697 F.2d 977, 979-80 (11th Cir. 1983).

Hence, "counsel will not be regarded as constitutionally deficient merely because of tactical decisions. Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated." Ford v. Strickland, 696 F.2d at 820 (citations omitted). Coniglio's decision not to put on any testimony concerning petitioner's drug usage was obviously strategic. Having practiced law in the area for seventeen (17) years, Coniglio could be

expected to be familiar with local attitudes and prejudices. This Court, therefore, will thus not second guess his his decision. Cf. Stanley v. Zant, 697 F.2d at 969-70 (counsel's position in reaching certain strategic decisions more advantageous than federal court's post hoc speculation).

Petitioner also complains that Coniglio failed to develop testimony concerning his age. Petitioner could not, however, have suffered any prejudice concerning this claim; the state elicited this testimony upon cross-examination. See TT at 435. Petitioner further alleges that Coniglio did not produce evidence demonstrating the insignificance of petitioner's prior convictions. This is not true. See TT at 433, 443-44. Petitioner also states incorrectly that counsel failed to develop the passive

nature of petitioner's escape from Oklahoma. During the penalty phase of the trial, the following exchange occured between Coniglio and his client:

> Q: When you left Oklahoma, you were on what they call a work release program?
>
> A: Yes, sir.
>
> Q: They took you to work and picked you up from work?
>
> A: Yes sir.
>
> Q: You didn't use any violence, you just walked away from work?
>
> A: Walked away, drove away.

TT at 434-35. Similar information was elicited on cross-examination. Id. at 436. Moreover, this Court is of the opinion that Coniglio's alleged failure to object to "irrelevant testimony of the penalty for escape in Oklahoma," does not fall outside the realm of reasonably effective counsel, nor does petitioner

cite any authority suggesting that result. More importantly, petitioner has not shown any prejudice from these statements. See Washington, 693 F.2d at 1258-62.

Petitioner attacks Coniglio's failure to present a final argument on behalf of petitioner's life as an unconstitutional deprivation of effective counsel, citing Herring v. New York, 422 U.S. 853 (1975). Herring, however, does not support petitioner's argument; the Court in Herring merely held that a statute providing the judge with discretion in determining whether closing arguments should be heard was constitutionally infirm. "The constitutional right of a defendant to be heard through counsel includes his right to have his counsel make a proper argument on the evidence and applicable law in is favor ... unless he has waived his right to such argument."

Id. at 860 (emphasis added). Thus, although counsel has a right to make final arguments, he is not required to do so. Id. at 857-58. Indeed, the Eleventh Circuit recently

> decline[d] to adopt a rigid rule which would require counsel to argue to the jury in a specific manner or to make particular objections during the penalty phase of a capital case. Each case turns on its own facts and the effectiveness of counsel must also be judged on the facts and conduct of those involved in each case.

Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983).

In addition, counsel's decision to waive final argument is less subject to constitutional attack when that decision was the result of a reasoned, strategic choice. In the instant case, waiver of final argument appears to be strategically motivated. Trial Judge John Booth noted

that "[i]n the chambers, we discussed the arguments to the jury, and both defense and the State waived any arguments to the jury." Id. at 448. The Florida Supreme Court also found Congilio's decison not to argue to be strategic. By waiving final argument on behalf of his client, Coniglio avoided potentially damaging arguments by the State on aggravating circumstances. See Songer III, 419 So.2d at 1047. Consequently, this Court is of the opinion that counsel's waiver of his final argument did not constitute ineffective assistance of counsel.

Petitioner also asserts that Coniglio improperly failed to object to several allegedly "fatally prejudicial deprivations of procedural rights in the sentencing phase." These include counsel's failure to object to the court's allegedly erroneous instructions

concerning mitigting and aggravating circumstances and to the verdict form used in the penalty phase. Because the Court is of the opinion that both the instructions and the verdict form were constitutionally permissible, see infra pp. 25-27, counsel cannot be held to be ineffective for failure to challenge those instructions and verdict form. Cf. Antone v. Strickland, No 82-21-Civ-T-GC, slip op. at 18 (M.D. Fla. Feb. 18, 1982) (appellate counsel cannot be held ineffective for not raising meritless claims), aff'd and remanded on other grounds, No. 82-5120 (11th Cir. June 13, 1983).

Although petitioner protests counsel's failure to object to the order in which the evidence was presented during the penalty phase, petitioner cites no case holding similar proceedings unconstitutional, nor does he cite any

authority requiring a particular order of proof. Similarly, petitioner cites no case holding counsel ineffective, as petitioner suggests, for failing to request confirmation that a majority of the jury recommended the death penalty or that an instruction be given that if petitioner was sentenced to life in prison, he could not be released before twenty-five years (25) years in jail. This Court cannot hold Coniglio ineffective for failing to raise objections not supported by any authority; nor can this Court declare counsel ineffective when petitioner has not demonstrated any prejudice by the alleged failures. See Washington v. Strickland, 693 F.2d at 1258-62.

Petitioner contends that he was deprived of his right to effective assistance of counsel at the resentencing

hearing. As discussed in more detail below, the nature of the remand for resentencing was very narrow. Coniglio cannot be faulted for failing to interview witnesses that would have allegedly testified on petitioner's behalf, not proffering evidence of petitioner's character from the time of the original sentencing, or otherwise conducting a substantial investigation prior to the resentencing. As the Florida Supreme Court noted in Songer II, it remanded the case to the trial court for resentencing consistent with the mandate of Gardner v. Florida, 430 U.S. 349 (1977). That is, the purpose of the remand was to ensure that petitioner and his counsel were provided the opportunity to examine the presentence investigation report ("PSI") prior to resentencing. Once that narrow directive had been accomplished, the

purpose of the remand would be fulfilled. None of petitioner's witnesses rebutted anything in the PSI. Consequently, petitioner's counsel cannot be said to be ineffective for failing to act outside the scope of the Gardner remand. Moreover, although petitioner claims that he was not shown the PSI, this is incorrect. See infra p. 36.

III. Jury Instructions and Verdict Form.

Petitioner contends that the trial court's jury instructions and the advisory sentence verdict form improperly limited defense counsel's presentation, and the jury's consideration, of mitigating evidence. In instructing the jury, the trial judge merely tracked the language of Florida's death penalty statute, Fla. Stat. §921.141 (1973); the advisory verdict form was modeled on the same language. Petitioner argues that this

approach is impermissible, citing the Florida Supreme Court's interpretation of the statute in Cooper v. State, 365 So.2d 1133 (Fla. 1976), and the United States Supreme Court's subsequent decision in Lockett v. Ohio, 438 U.S. 586 (1978). Petitioner argues that these instructions and the advisory form violated his due process rights and his right to reliability in the imposition of a death sentence.

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), the Eleventh Circuit, the Florida Supreme Court, and the district courts within this district have all rejected similar arguments. In Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir. 1978), the Fifth Circuit noted that at the time Proffitt v. Florida, 428 U.S. 242 (1976) (upholding constitutionality of Florida's

death penalty statute), was decided, the Florida death penalty statute did not

> prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor ... Cooper v. State, [365 So.2d 1133 (Fla. 1976)] ... the case relied upon by Spinkellink, was not decided until July 8, 1976. Spinkellink was sentenced on December 20, 1973, and his conviction affirmed by the Florida Supreme Court on February 19, 1975. At the time of the sentencing proceeding, Spinkellink was afforded ... every opportunity to set forth any and all mitigating factors in his favor

Spinkellink v. Wainwright, 578 F.2d at 621 (quoting in part Lockett v. Ohio, 438 U.S. 586 (1978); see also Dobbert v. Strickland, 532 F. Supp. 545, 553 (M.D. Fla. 1982).

Like Spinkellink, petitioner was sentenced on February 28, 1974, and that sentence was affirmed by the Florida

Supreme Court on September 3, 1975, long before the Florida Supreme Court's decision in Cooper. The Court in Lockett held invalid any statute precluding the sentencer from considering mitigating evidence the defendant proffers. See Lockett, 438 U.S. at 604. Petitioner, however, was not prevented from proffering any evidence in mitigation. See Goode v. Wainwright, No. 82-30, slip op. at 20 (M.D. Fla. Feb 25, 1982) (no Lockett violation where petitioner not precluded from offering any evidence in mitigation), aff'd in part and rev'd in part on other grounds, 704 F.2d 593 (11th Cir. 1983). Indeed, Coniglio elicited testimony from petitioner at the penalty stage concerning petitioner's nonviolent escape, the paucity of previous crimes committed by petitioner, and their nonviolent nature. See TT at 433. Trial counsel also

attempted to establish that petitioner was not under a sentence of imprisonment at the time of his escape. Id.; see Fla. Stat. §921.141(5)(a) (1973). Finally, Coniglio attempted to establish that petitioner was "run down" at the time of the incident and that petitioner could not have been a "hardened criminal type," as he qualified for the work-release program in which he was enrolled. TT at 434, 443. Furthermore, the Supreme Court of Florida rejected this identical challenge by petitioner in Songer II, 365 So.2d at 700; see also Ford v. Strickland, 696 F.2d at 812; cf. Jones v. State, 411 So.2d 165, 168 (Fla. 1982) (omissions of instruction that mitigating circumstances not limited to those enumerated in statute does not require resentencing).

IV. Brown Issue.

Petitioner asserts that the Florida

Supreme Court improperly considered nonrecord material, including "a secret psychiatric evaluation" of petitioner. This so-called "Brown" claim, see Brown v. Wainwright, 393 SO.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981), was thoroughly discussed and rejected in Ford v. Strickland, 696 F.2d at 810-11.

V. Improper Burden of Proof.

Petitioner also contends that the trial court placed upon him an unreasonable burden of proof when it allegedly "required" petitioner to present his mitigating evidence prior to the state's presentation of aggravating factors. Petitioner argues that in the mind of a reasonable juror, this order of presentation would unconstitutionally shift the burden of proof to himself. Petitioner cites no authority in support of his claim. Moreover, the Florida

Supreme Court specifically rejected this claim in Songer IV: "Mitigating circumstances are offered during the penalty phase to show the totality of the circumstances. The evidence is offered to show that the circumstances warrant less than the penalty of death. There is no improper shifting of the burden of persuasion." Id. at 356; see also Jackson v. Wainwright, 421 So.2d 1385, 1389 (Fla. 1982) ("There can be no 'shifting' with respect to a fact which must be proved during the sentencing procedure."). Petitioner seems to be claiming that the order of proof shifted his burden relative to that of the prosecution. This argument resembles one that the Eleventh Circuit rejected in Ford.

> While the existence of an aggravating or mitigating circumstance is a fact susceptible of proof under a reasonable doubt or

> preponderance standard ... the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.

Ford v. Strickland, 696 F.2d at 818. Thus, because "[t]he aggravating and mitigating circumstances are not facts or elements of the crime," Id., which must be proved beyond a reasonable doubt, the order of proof could not have unconstitutionally burdened petitioner.

VI. Mitigating and Aggravating Circumstances.

Petitioner asserts that the trial court failed to adequately consider several factors affecting the proper application of the death sentence. Petitioner claims that the trial court "failed to find or consider" petitioner's age, the alleged insignificance of his

criminal history, or that his capacity to appreciate the wrongfulness of his conduct was substantially impaired. The Floirda Supreme Court considered and rejected these claims in Songer I:

> In relating the statutorily enumerated mitigating circumstances to the [petitioner] ... [w]e have supplied these standards to ... [petitioner] and have found them to be inapplicable: (1) youth: Appellant is 23 years old, and today one is considered an adult responsible for one's own conduct at the age of 18 years; (2) intoxication: there is sufficient evidence to justify the jury's finding that Appellant was not so intoxicated as to be unaware of what he was doing; and (3) Appellant's three prior felony convictions which fall between the extremes mentioned in Dixon [State v. Dixon, 283 So.2d 1 (Fla. 1973)], and which are not so insignificant as to ignore them. Thus, we agree with the trial court that there are no mitigating circumstances sub judice.

Songer I, 322 So.2d at 484. The

undersigned is of the opinion that the Florida Supreme Court is correct. Twenty-three (23) is not such an early age that it might mitigate the homicide. In addition, not only was there evidence from which the jury could find that petitioner was not intoxicated at the time of the murder, but it was specifically established at the 3.850 Hearing that petitioner had not ingested drugs other than marijuana after leaving Oklahoma. See 3.850 Hearing at 52. Furthermore, although petitioner's previous convictions were not violent or of an extremely serious nature, it cannot be said that failure to recommend a sentence less than death as a result of these convictions for nonviolent offenses amounted to reversible error. The case upon which petitioner relies for support, Eddings v. Oklahoma, 102 S.Ct. 869 (1982), is inapposite. In

Eddings, the trial judge specifically refused to consider certain mitigating evidence which the petitioner proferred. In contrast, petitioner in the instant case was not prevented from introducing anything into evidence. The Florida Supreme Court also specifically considered the mitigating factors that petitioner proferred. Consequently, petitioner's assertions are without merit.

Petitioner also contends that the trial court "erroneously found," as one of the aggravating circumstances, that petitioner was "under a sentence of imprisonment" at the time of the offense. Petitioner's argument is incorrect. "[A]t the time he killed the patrolman, [petitioner] was under a three-year sentence of imprisonment for the larceny of an automobile." Songer I, 322 So.2d at 484. This fact was established both at

the penalty phase and the 3.850 hearing.

> Q: [By the state]: This work release program that you were on, you were under a sentence of imprisonment at the time, were you not?
>
> A: [petitioner]: Yes.

3.850 Hearing at 43-44; see also TT at 436, 439-40; EH at 31.

Petitioner states that the trial court "erroneously found" a second aggravating circumstance, that petitioner killed a trooper during the exercise of a lawful government function. Petitioner further alleges that this aggravating circumstance was found without proof that petitioner knew the victim was an agent of the state government. First, the Florida Supreme Court found that "Songer shot Trooper Smith while he was in uniform, on active duty, and making a routine inspection of an apparently abandoned

vehicle, all of which was a lawful exercise of governmental function." Songer I, 322 So.2d at 484. This finding of fact is presumed correct, unless the petitioner falls within one of the eight exceptions enumerated in 28 U.S.C. §2254(d) (1976). See Sumner v. Mata, 449 U.S. 539, 547 (1981). Petitioner has not shown that he is within one of the eight exceptions. In addition, after an independent examination of the record, this Court is also of the opinion that the evidence supports the trial courts' finding of these aggravating circumstances. Second, petitioner also cites no authority requiring that defendant must be aware that the victim is exercising a governmental function.

Petitioner also attacks this particular aggravating circumstance as unconstitutionally vague on its face. In

upholding Fla. Stat. §921.141 (1973)--including this particular aggravating circumstance--in Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court held that a person convicted of first-degree murder in Florida receives "an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death." Proffitt v. Florida, 428 U.S at 259. In validating the statute, the Court necessarily approved the particular aggravating circumstance at issue here. In Godfrey v. Georgia, 446 U.S. 420 (1976), the Supreme Court upheld an aggravating circumstance in the Georgia Code substantially similar to the subsection presently under attack. Georgia Code §27-2534.1(b)(8) (1978) lists as an aggravating circumstance justifying the imposition of the death penalty,

"[t]he offense of murder ... committed against any police officer ... while engaged in the lawful performance of his official duties." Godfrey v. Georgia, 446, U.S. at 424 n.2. The Supreme Court stated that "the ... statutory aggravating circumstances ... are considerably more specific or objectively measurable [than §27-2534.1(b)(7), which the court held unconstitutionally vague as applied]." Godfrey v. Georgia, 446 U.S. at 423 n.2. This Court refuses to add any additional requirements to a constitutionally specific statute.

Petitioner also claims that the latter aggravating circumstance is unconstitutionally vague as applied. This Court disagrees. A state trooper's examination, as in this case, of what could well be an abandoned car, or a motorist in distress on the side of a

road, is clearly within the trooper's exercise of his lawful governmental function.

VII. Lack of Charge Conference Transcript.

Petitioner argues that the absence of the charge conference transcript denied him his right to due process, reliability in the imposition of sentence, effectiveness of counsel on appeal and proportionality of review of his sentence. This claim is without merit. Although agreeing with petitioner that a defendant under a sentence of death in Florida has the right to have his entire record reviewed, the Court in Songer IV found that

> [a]s long as all instructions are required to be in writing, and all were in the trial of this case, the statements made by the court and the attorneys at the charge conference become immaterial. The petitioner

> could suffer no prejudice from the failure to include such statements in the record.

Songer IV, 423 So.2d at 356.

In Stephens v. Zant, 631 F.2d 397, 402 (5th Cir. 1980), modified on other grounds, 648 F.2d 446 (1981), aff'd on other grounds, Zant v. Stephens, 51 U.S.L.W. 4891 (U.S. June 22, 1983) (No. 81-89), the Fifth Circuit rejected the claim of a death-row inmate that the absence of the transcript of both the closing arguments and arguments at petitioner's sentencing violated the eighth amendment. The court stated that

> [i]f the record presented to the [court] was so deficient that it would be impossible for that court to perform the function required of it under Gregg [Gregg v. Georgia, 428 U.S. 153 (1976)], or would create "a substantial risk that the penalty is being inflicted in an arbitrary and capricious manner ... petitioner's sentence cannot be permitted to stand.

Id. at 403 (citations omitted). Like the defendant in Stephens, however, petitioner has not offered any evidence that he was "actually prejudiced" by any statements made at the charge conference or by the absence of the transcript itself. See Stephens v. Zant, 631 F.2d at 404. Unlike Stephens, where the court reached its result despite the absence of the transcript of both closing arguments and during the sentencing phase of defendant's trial, petitioner merely protests the absence of a charge conference transcript. The absence of a transcript of this small and relatively unimportant portion of petitioner's trial cannot inject the type of unreliablility in sentencing that Gregg condemned. Cf. United States v. Selva, 559 F.2d 1303, 1306 (5th Cir. 1977) (under Court Reporter Act, 28 U.S.C. §753 (1976), cases reversed only where "substantial and

significant portion" of record is missing; types of cases requiring reversal include missing transcripts of opening or closing arguments, voir dire, or defense arguments).

VIII. Statutory Challenge.

Petitioner also challenges the constitutionality of Fla. Stat. §921.141 (1973) on its face, and as applied to petitioner. Petitioner states that the statute is unconstitutional because it contains no requirement that the aggravating circumstances be alleged, or that notice be given prior to the trial or sentencing proceedings. The court in Spinkellink v. Wainwright, 578 F.2d at 609-10, rebuffed a nearly identical claim, stating that the statute itself defines the aggravating circumstances upon which a court or juror may rely; a petitioner need only examine the statute to receive proper

notice. Cf. Ruffin v. State, 397 So.2d 277, 282 (Fla.) (defendant has no right to bill of particulars concerning aggravating circumstances upon which state will rely to support its request for the death penalty), cert. denied, 454 U.S. 882 (1981).

Petitioner also asserts that the Florida statute is unconstitutional because no standard of proof exists for the "overall weighing process" to determine whether death is appropriate, and the jury is not sufficiently guided in applying both the aggravating and mitigating circumstances. These contentions have already been discussed and found to be without merit. See supra pp. 28-29, 31. The United States Supreme Court recently rejected a similar claim in Zant v. Stephens, 51 U.S.L.W. at 4894-95. The Court held that the "absence of

legislative or court-imposed standards to govern the jury in weighing the significance of ... aggravating circumstances" does not render Georgia's capital sentencing statute invalid. Id. at 4895. The Georgia statute passed constitutional muster because the aggravating circumstances properly circumscribed the class of persons eligible for the death penalty. The statute also provides the requisite individualized determination and appellate review regarding the imposition of the death penalty on those persons who are selected for capital punishment. Id. This Court is of the opinion that Florida's capital sentencing statute is sufficiently similar to the Georgia statute to withstand the same constit-tutional scrutiny. Like the Georgia statute, the aggravating circumstances

contained in the Florida statute circumscribe those eligible for the death penalty. The Florida statute also provides that petitioners under a sentence of death will receive a substantially similar appellate review to that of their Georgia counterparts. Thus, petitioner's contention that the Florida statute is unconstitutional is without merit. Finally, petitioner's claim that the aggravating circumstances are unconstitutionally vague, as applied, has already been rejected by this Court. See supra p. 29-32.

IX. Gardner Violation.

Petitioner attacks both his sentencing and resentencing as unconstitutional under Gardner v. Florida, 430 U.S. 349 (1977). In Gardner, the Supreme Court held that a petitioner in a capital case must be given the opportunity to deny or explain information contained

in a PSI. The Supreme Court remanded the instant case for consideration in light of its Gardner opinion. See Songer v. Florida. 430 U.S. 952 (1977).

As a preliminary matter, this Court notes that there may never have been an initial Gardner violation. The trial judge noted "the receipt of a pre-sentence investigative report ... [6] by the State and defendant's attorney ..." Findings of Fact (Feb. 28, 1974); see also TT at 450 ("[Court]: Has the State and the defendant each received a copy of the presentence investigation report? Mr. Coniglio: We have, your honor."); Songer II, 365 So.2d at 669 (counsel saw PSI and had opportunity to challenge that document on both original sentencing and resentencing).

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6 Petitioner's PSI was merely a copy of petitioner's "rap sheet."

Petitioner also contends that there was "no meaningful revisiting of the case" on resentencing because the court denied petitioner's motion to produce various witnesses. The Florida Supreme Court, however, correctly stated that the resentencing hearing "was only for the purpose of allowing the defendant an opportunity to rebut what was contained in the presentence investigation report." Songer II, 365 So.2d at 699-700; see also Funchess v. State, 399 So.2d 356 (Fla. 1981) (purpose of resentencing after Gardner does not include convening an advisory jury). Because none of the witnesses petitioner wished to testify would have rebutted anything in the PSI, he is not entitled to another resentencing proceeding.

X. Ineffective Assistance of Appellate Counsel.

Petitioner claims that his counsel on

original appeal was ineffective. In support of his argument, petitioner lists a number of points which appellate counsel allegedly should have raised on appeal, but did not. As a preliminary matter, this Court emphasizes that counsel cannot be held ineffective for failure to raise meritless contentions. Cf. Antone v. Strickland, No. 82-61-Civ-T-GC, slip op. at 18 ("Reasonable assistance of appellate counsel does not include an obligation to raise issues on appeal in those areas of the law which appear well-settled."). Nearly all of the points that petitioner insists should have been raised have been discussed earlier and rejected.

The only point not addressed previously concerns appellate counsel's failure to argue the trial court's lack of an instruction to the jury that the State had the burden of proving the existence of

aggravating circumstances beyond a reasonable doubt. Appellant cites no authority specifically requiring a trial court to so instruct the jury. More importantly, after the jury has recommended a sentence to the trial judge, both the state trial judge and the Florida Supreme Court independently determine the sufficiency of the aggravating circumstances. The trial judge "must focus on the individual circumstances of each homicide and each defendant," and "the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida." Proffitt v. Florida, 428 U.S. 252-53. Moreover, "any suggestion that the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted ..." Id. at 259. In this case, the Florida Supreme

Court specifically found that the two aggravating circumstances found by the trial judge were adequately supported by the record. See Songer I, 322 So.2d at 483. Thus, even if it were determined that the trial court should have specifically instructed the jury on the state's burden of proof concerning aggravating circumstances, that error is harmless, given the multi-layered system of review that the Florida statute requires. In addition, the undersigned is of the opinion that the State did in fact prove the aggravating circumstances beyond a reasonable doubt.

Finally, the Eleventh Circuit's recent statement in Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983), is also dispositive of petitioner's claims that he did not receive effective assistance of counsel on appeal:

Sullivan also contends that counsel was ineffective because he did not raise certain issues on direct appeal to the Florida Supreme Court. Counsel did file a brief on appeal which argued and supported several substantive legal claims, such as the admission of testimony relating to a polygraph. This is not a situation similar to Mylar v. Alabama, 671 F.2d 1299, 1302 (11th Cir. 1982), where we held that failure to file a brief in a nonfrivolous appeal falls below the standard of competency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance of counsel. Sullivan's appellate counsel functioned as an active advocate on behalf of his client. Anders v. California, 386 U.S. 738, 44 (1967). The failure of counsel, in 1974, to advance certain points on appeal which subsequently gained judicial recognition does not render counsel ineffective. Sullivan acknowledges that he was one of the first defendants to be tried under Florida's post-Furman death penalty statute. At the time of trial and appeal in 1973-74, the law concerning capital sentencing was in a state of reformation. Sullivan does not direct us to any case decided at that time and overlooked by counsel.

> Counsel's failure to define the judicial development of Florida's capital sentencing does not constitute ineffective assistance of counsel. Accord Proffitt v. Wainwright, [685 F.2d 1227 (11th Cir. 1982)].
>
> Thus, we find that Sullivan received reasonably effective assistance of counsel ... on direct appeal.

Sullivan v. Wainwright, 695 F.2d at 1309, see also Alvord v. Wainwright, No. 81-366-Civ-T-K, slip op. at 39 (M.D. Fla. March 23, 1983) ("Typically, claims of ineffective assistance on appeal turn on counsel's complete failure to file or prosecute the appeal."). Like Sullivan's attorney, petitioner's appellate counsel filed a brief on direct appeal raising several challenges. These included an attack on the sufficiency of the evidence and various evidentiary objections, as well as a series of challenges to the Florida statute itself. Thus, it cannot

be said that appellate counsel's representation even approximated the type of conduct that Mylar condemned.

In addition, several of the claims which petitioner argues that his appellate counsel should have raised on direct appeal were eventually considered by the Florida Supreme Court. See, e.g., Songer I (disruption of governmental function); Songer II (Lockett issue); Songer III (instructions on burden of proof at sentencing, and effectiveness of trial and appellate counsel); Songer IV (improper "shifting" of burden of proof at penalty phase; absence of charge conference transcript; ineffectiveness of trial and appellate counsel). This Court agrees with the Florida Supreme Court that "[p]etitioner has failed to demonstrate that he was prejudiced in any way because of failure of his counsel to raise [these]

issue[s] instead of the court's pursuing the matter[s] on its own volition." Songer IV, 423 So.2d at 356-57. Hence, nearly all of petitioner's claims were considered either on direct appeal or at a later time by the Florida Supreme Court. Having shown no prejudice by appellate counsel's failure to raise these issues, petitioner's claim of ineffective assistance of counsel on appeal must fail for the reasons articulated above.

XI. Addition of Third Aggravating Circumstance.

Petitioner claims that the Florida Supreme Court improperly added a third statutory aggravating circumstance "not found" by the trial court. This claim has never been raised before any other tribunal, despite the continuity of petitioner's present counsel from the time of filing the Rule 3.850 motion until the

present date. At a minimum, this question should have been raised in petitioner's 3.850 motion, and certainly on petitioner's state petition for writ of habeas corpus. Moreover, unlike the procedural setting in Proffitt v. Wainwright, 685 F.2d at 1266 n.60, the State in this case has properly raised the "waiver" argument and cannot be said to have waived its objections to the instant claim. As a result, petitioner is barred from raising this belated claim, unless he demonstrates cause for, and prejudice from, not raising this contention. See Engle v. Issac, 102 S.Ct. at 1572. Because petitioner has made no allegations concerning cause, this Court need not consider whether petitioner has demonstrated sufficient prejudice.

This Court notes in passing, however, that even if petitioner had properly preserved this claim for purposes of the

present petition, the claim lacks merit. As a general rule, even when one or more of the aggravating circumstances upon which a court relied in imposing the death sentence is overturned, the sentence of death will not be overturned where "at least one valid aggravating circumstance remains." Zant v. Stephens, 51 U.S.L.W. at 4897-98. This is especially true when only insignificant mitigating circumstances exist, or there are no mitigating circumstances at all. See Dobbert v. Strickland, 532 F. Supp. at 555-56 (upholding death penalty despite the striking by Florida Supreme Court of two of four statutory aggravating circumstances found by state trial judge); Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982) (negation of one of three statutory aggravating circumstances does not require reversal in absence of

mitigating factors); Jacobs v. State, 396 So.2d 1113, 1118-19 (Fla.)(trial court's incorrect finding of four statutory aggravating factors when three should have been enumerated did not require reversal where only mitigating circumstance was a lack of prior history of significant criminal activity), cert. denied, 454 U.S. 933 (1981); Clark v. State, 379 So.2d 97, 104 (Fla. 1979) ("doubling up" of aggravating circumstances not reversible error where no mitigating circumstances and several aggravating circumstances remained), cert. denied, 450 U.S. 936 (1981). In the instant case, the trial judge found two aggravating circumstances, both of which were affirmed on appeal. See Songer I, 322 So.2d at 484. The Florida Supreme Court merely added an aggravating circumstance after petitioner's first appeal. This action,

if error, was harmless. The existence of the two statutory aggravating circumstances, with no mitigating circumstances balanced against them, is more than enough to sustain petitioner's death penalty. See Zant v. Stephens, 51 U.S.L.W. at 4897-98; Jacobs v. State, 396 So.2d at 118-19 (death penalty preserved when one or more statutory aggravating circumstances found). The Florida Supreme Court agreed when it affirmed petitioner's second sentence in Songer II.

In addition, it is unclear whether the Florida Supreme Court actually intended to add a third aggravating factor. In his initial findings of fact, the trial court judge specifically found two statutory aggravating factors: "(1) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the

enforcement of law, and (2) The capital felony was committed by a person under a sentence of imprisonment ..." Findings of Fact (Feb. 28, 1974); see Fla. Stat. §921.141 (1973). In support of this latter aggravating circumstance, the trial judge noted that petitioner escaped from prison while under a sentence of imprisonment. Findings of Fact (Feb. 28, 1974). In affirming petitioner's sentence, the Supreme Court of Florida specifically noted an additional aggravating circumstance, to-wit: "while serving such sentence appellant escaped from the Oklahoma prison system and, at the time of the fatal shooting, was a fugitive from the law." Songer I, 322 So.2d at 484; see also Fla. Stat. §921.141(5)(e) (1973).

Nonetheless, on remand after resentencing, the trial judge again found

the same two aggravating circumstances in support of the capital sentence, and listed identical reasons for upholding his findings. The Florida Supreme Court affirmed this sentence in Songer II-printing the entire trial court order in a footnote--without additional comment concerning the aggravating circumstances. Hence, it is possible to conclude, as the State suggests, that the addition of the third aggravating circumstance was "inadvertent." Even assuming, however, that the Florida Supreme Court's addition of the third aggravating circumstance was not inadvertent, the result remains the same.

The case upon which petitioner relies for support, Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), is inapposite. In that decision, Proffitt attacked his sentence because it was allegedly based on

unsupported and nonstatutory aggravating factors. Id. at 1261, n.52. In the instant case, however, petitioner attacks the Florida Supreme Court's finding of an alleged additional statutory aggravating factor which the evidence fully supports. See Songer I, 322 So.2d at 484; TT at 240-42, 265, 364-65; EH 22, 37.

This case is also distinguishable from Presnell v. Georgia, 439 U.S. 14 (1978). In that case, the Supreme Court rejected the imposition of the death penalty when an appellate court rejected the jury's basis for its sentence in favor of a different theory. In the instant case, the Florida Supreme Court did not reject the lower court's findings, but instead affirmed them. The court merely added an aggravating circumstance that was fully supported by the evidence. In Proffitt, the Eleventh Circuit stated that

"[o]nly where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result should a sentence be affirmed despite constitutional error." Proffitt v. Wainwright, 685 F.2d at 1269. This Court is of the opinion that no constitutional error occured. Even if, however, the Florida Supreme Court erred in adding a third aggravating circumstance, the undersigned believes that no reasonable person properly applying the statute could overturn petitioner's death sentence, based upon the existing statutory aggravating factors present in this case. As a result, petitioner's contention is not only barred by procedural default, but it also fails on the merits as well.

XII. Other Grounds.

Petitioner argues that the procedures

used to impose his death sentence were unreliable and arbitrary, and therefore, violative of both the eighth and fourteenth amendments to the United States Constitution. In part, petitioner attacks the trial court's jury instructions as wholly inadequate to guide the jury's exercise of its discretion. First, petitioner claims that the jury is given no guidance in applying the aggravating and mitigating circumstances. Second, he argues that the jury was not properly instructed as to the burdens of proof concerning both the statutory aggravating factors and mercy. Third, petitioner contends that the trial judge should have instructed the jury that they could recommend a life sentence for the petitioner even if aggravating circumstances were found.

Petitioner did not, however, object

to the court's instructions at trial, as Fla.R.Crim.P. 3.390(d) requires. Indeed, petitioner's counsel specifically indicated that he had no objections to any of the instructions. TT at 448. Petitioner also failed to raise these claims on direct appeal. Based on petitioner's failure to object to the instructions as trial, and his failure to raise these claims on direct appeal, petitioner is now barred from raising these issues, unless he can demonstrate cause and prejudice for these failures. See Engle v. Issac, 102 S.Ct. 1558, 1572 (1982). Petitioner has alleged neither cause nor prejudice, and is now barred from raising these claims.

Similarly, petitioner advances other claims that are barred by his failure to object at trial or to raise arguments concerning these claims on direct appeal.

See Engle v. Isaac, 102 S.Ct. at 1572. These claims include the trial court's allegedly erroreous failure to define the aggravating or mitigating circumstances, and its failure to inform the jury concerning options in sentencing, and its failure to poll the jury to ensure that majority of the jury panel recommended the death penalty.

Petitioner's claim that electrocution violates the eighth amendment was rejected nearly 100 years ago by the United States Supreme Court in In re Kemmler, 136 U.S. 436, 447 (1890), cited with approval in Gregg v. Georgia, 428 U.S. 153, 178 (1976); Spinkellink v. Wainwright, 578 F.2d at 616.

Petitioner also asserts that he was deprived of effective counsel on resentencing. Petitioner argues that counsel did not raise the

unconstitutionality of the Florida statute as applied to petitioner. This Court has discussed and rejected this claim as without merit. See supra pp. 32, 34. Appellate counsel cannot, therefore, be ineffective for failure to raise this claim. See Antone v. Strickland, No. 82-61-Civ-T-GC, slip op. at 18.

Petitioner also states that appellate counsel did not raise the failure of either trial counsel or the court to show petitioner his "rap sheet" at the resentencing. Both of these claims have been discussed and rejected. See Songer IV, 423 So.2d at 357; supra P. 36. Accordingly, it is

ADJUDGED:

1. That the petition for writ of habeas corpus is hereby denied;

2. That the stay of execution, previously entered by this Court on

December 3, 1982, is hereby dissolved; and

3. That the Clerk shall enter Judgment dismissing this action.

ORDERED at Jacksonville, Florida this 14th day of July, 1983.

/s/ Howell W. Melton
United States District Judge

Copies to:
Counsel of Record

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR CITRUS COUNTY.

Criminal Case No. 74-49-CF-A-01

STATE OF FLORIDA

v.

CARL RAY SONGER, a/k/a ROBERT BERRY,

Defendant.

SECOND FINDINGS OF FACTS

THIS CAUSE coming on this day to be considered pursuant to the provisions of Section 921.141, Florida Statutes, after (1) conviction of the defendant Carl Ray Songer, a/k/a Robert Berry, of Murder in the First Degree, by a duly impaneled jury and his adjudication of guilt of such offense, (2) the rendition by such jury at the conclusion of the sentencing proceeding of an Advisory Sentence recommending the imposition of the death sentence, (3)

the receipt of a pre-sentence investigative report on said defendant by the undersigned, a copy of same in its entirety having been furnished to both the State and Defense prior to the original sentencing, (4) the filing of "Findings of Fact" and the imposition of the death sentence on February 28, 1974, (5) the remand by the Florida Supreme Court to this Court for re-sentencing only consistent with the opinion of the United States Supreme Court of Gardner v. Florida, 45 U.S.L.W. 4275 (March 22, 1977), and proceeding only consistent therewith finds

(a) that the only pre-sentence investigative report considered in arriving at the disposition made at the original sentencing is the report referred to in (3)

above, copy of same in its entirety being attached.

(b) that the only pre-sentence investigative report to be considered at the re-sentencing is the report referred to in (3) above, copy of same in its entirety being attached.

and after carefully considering and weighing the evidence presented during such trial and the original sentencing proceeding, the original arguments and arguments made today of the attorneys as to the sentence to be imposed and reviewing again the factual information contained in said pre-sentence investigation, the undersigned concludes and determines that aggravating circumstances exist, to-wit: (1) the

capital felony was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws, and (2) The capital felony was commited by a person under sentence of imprisonment; and that such aggravarting circumstances outweighs the mitigating circumstances, to-wit: none; and based upon the records of such trial and sentencing proceedings makes the following findings fo facts, to-wit:

1. A Capital felony, namely Murder in the First Degree, was committed by the defendant Carl Ray Songer to disrupt or hinder the victim, namely Ronald G. Smith, from the lawful exercise of a governmental function, or the enforcement of laws; all as is reflected by the testimony of Ralph Morris and Richard Starling, showing that at the time and place of the commission of

such capital felony:

(a) the victim, a Trooper while on active duty and in full uniform of the Florida Highway Patrol approached a vehicle for the purpose of making a routine inspection or what appeared to be an abandoned or stolen vehicle;

(b) the defendant did shoot and kill said victim who was then and there attempting to enforce the laws of the State of Florida or lawfully exercise a governmental function;

(c) the defendant did shoot and kill said victim without justification, cause or provocation.

2. A capital felony, namely Murder in the First Degree, was committed by the defendant Carl Ray Songer who was then

under sentence of imprisonment, namely three years in the Oklahoma State Prison, as is shown and reflected by the testimony of Joe Smith, Chief Security Officer of Lexington State Prison, Lexington, Oklahoma, and other testimony presented during such trial and sentencing proceeding, all reflecting that:

(a) on the 28th day of July, 1972, he was sentenced to a term of three years in the State Prison of the State of Oklahoma for the larceny of an automobile;

(b) on the 10th day of November, 1973, while serving such sentence he escaped from the prison system of the State of Oklahoma;

(c) at the time of the commission of such capital felony the

defendant was under such sentence of imprisonment;

and based thereon concludes that the death sentence should be imposed upon said defendant.

DATED this 17th day of August, 1977.

[s]
JOHN W. BOOTH, Circuit Judge

IN THE CIRCUIT COURT IN AND FOR
CITRUS COUNTY, FLORIDA
CRIMINAL CASE NO. 74-49-CF

STATE OF FLORIDA

-vs-

CARL RAY SONGER, a/k/a
ROBERT BERRY

Defendant

.....

THIS CAUSE came on for resentencing in accordance with the mandate of the United States Supreme Court, before Honorable John W. Booth, Circuit Judge, at Invernes, Citrus County, Florida, on August 17, 1977, at which time the following proceedings were had:

APPEARANCES:

Honorable G. G. Oldham
State Attorney
Fifth Judicial Circuit

Honorable W. T. Green
Assistant State Attorney
Fifth Judicial Circuit

FOR THE STATE

Honorable C. John Coniglio
Attorney at Law
Wildwood, Florida

Honorable Robert Pierce
Public Defender
Fifth Judicial Circuit

FOR THE DEFENDANT

THE COURT: Let the record reflect that this matter is back before the circuit court having been remanded by the Florida Supreme Court to this circuit for resentencing in accordance with the mandate of the United States Supreme Court. Do you have a copy of the order of remand?

MR. PIERCE: This, your Honor?

THE COURT: Yes. This case having been reversed on the basis of Gardner vs. Florida, 45 U.S. Law 4275. Present in open court today in response to the order to remand is Mr. Gordon G. Oldham, State Attorney for this circuit, together with his assistant, Mr. W.T. Green. Also present is Mr. Robert Pierce, Public Defender for this circuit, and the privately appointed trial attorney, Mr. C. John Coniglio of Wildwood. Also present is the defendant, Carl Ray Songer. Before

proceeding into the sentencing provisions, procedures, are there any matters to be taken up by either the State or the defendant?

MR. OLDHAM: The State has none, your Honor.

MR. CONIGLIO: Your Honor, the defendant has several to be taken up. First, Your Honor, the defendant objects to being re-sentenced in Citrus County. The venue in this case was transferred to Osceola, the defendant request that he be re-sentenced in Osceola County, for that reason, and for the additional reasons that the defendant feels prejudice still runs high in this county, coupled with the recent shooting of a Florida Highway Patrolman in this State, we would require that the sentencing procedure be held in Osceola County. Number two, we would request that

the Court and grant a motion which the defendant has filed in proper person, I received a copy of it August 6th, asking that certain witnesses be summoned by the Court to appear in his behalf at a sentencing hearing. In that regard, Mr. Pierce has prepared a praecipe for witnesses for those persons, to be filed with the clerk in open court. Thirdly, before any sentencing is held, we request taht a jury be empanelled to hear testimony and make recommendations to the Court as provided by the laws of the State of Florida and as proviced in Gardner v. Florida which the remand from the Florida Supreme Court instructed taht sentencing should be held in accordance with that opinion. Fourthly, we would request that after the adversary type proceeding and juryu empanelled, after that verdict by that jury, the court

a pre-sentence investigative report before finally making the determination of what sentence should be imposed. Those are the four request, your Honor. Your Honor, one further objection that we have before the Court at this time, the U.S. Supreme Court decision remanded to the Florida Supreme Court, I believe, and although I have not been furnished with a copy of it, as the public defender's office took up the appeal, but as I understand the remand, or the reversal from the Supreme Court of the United States, said that it was remanded to the Florida Supreme Court in accordance with Gardner v. Florida. In that decision, I think the turning point was that the Supreme Court of Florida did not review the judgment and sentence in this case, had been remanded to the Florida Supreme Court, and the

Florida Supreme Court, I understand, remanded it to this Court without reviewing it in accordance wth the principles laid down in Gardner vs. Florida. And, I quote from that opinion: The Court says:

> The opinion does not say that the Supreme Court evaluated the propriety of the death sentence. It merely says the trial judge did so. Despite its professed obligation to do so, the Supreme Court thus failed "to determine independently" whether death was the appropriate penalty. The Supreme Court also appears to have done nothing "to guarantee" consistency with other death sentences.

It would appear the Supreme Court has done the same thing in this Songer case, it was remanded to this Court without doing that. So, for those reasons, we would object to the sentencing at this time.

THE COURT: The fourth point, Mr. Coniglio, was that it appeared that the Florida Supreme Court had not reviewed the P.S.I.,

is that basically. . .

MR. CONIGLIO: Yes, sir. As I understand the decisions remanding this case both from the U.S. Supreme Court and then the Florida Supreme Court remanded to this Court, in each case is says to remand in accordance with principles in Gardner v. Florida. And, of course, that opinion says that the Florida Supreme Court should review that sentence.

THE COURT: Mr. Oldham?

MR. OLDHAM: First, your Honor, the point of the venue of sentencing, the Court is making that decision now, so it wouldn't make any difference whether there was or was not prejudice, and the case was merely transferred to Osceola County for trial purposes. Secondly, your Honor, as to the witnesses that he desires to appear here, if the Court will examine the list they

will find they are all people that are incarcerated in Raiford State prison, as far as their opinion of his character, has nothing to do with the sentence of this Court. Thirdly, as to Mr. Coniglio's statement that the reversal in the Gardner vs. State was for the Florida Surpeme Court to reveiw the pre-sentence investigation. I would say to the Court that after this sentencing, he has the right to perhaps appeal to the Florida Supreme Court for them to review the pre-sentence investigation if he so desires, they would not review it prior to his Honor sentencing this defendant any way. For those basic reasons, I think his motion should be denied, your Honor.

THE COURT: Do you have any response, Mr. Coniglio?

MR. CONIGLIO: Your Honor, the only

response I would have, is that I think that a jury should be empanelled by the court in accordance with the Florida law. I don't know that has been decided, it was remanded for sentencing and I don't know why we should not have that opportunity to present mitigating circumstances before a jury as required by law, and further why we don't have the right to a pre-sentence investigative report to be made by this Court.

MR. OLDHAM: Your Honor, to that I would say that the United States Supreme Court has stated that Florida law on capital punishment is constitutional, and under the Florida law, the trial jury makes those recommendations to the Court, and the defendant produces any evidence he has at that time within the rules. This was done. The jury that convicted him went

ahead and made a recommendation to this Court, the recommendation of death. It would not be practical for another jury to come in that has not listened to all the testimony and go back and make another recommendation, that has been taken care of, your Honor. And, as far as a new presentence investigation report, actually the facts exist as at the time of the crime. When your are on the death row in Raiford, you don't have much of a chance to cause any trouble.

MR. PIERCE: May it please the Court, I believe Mr. Oldham isn't aware of the fact that Mr. Songer has not been on death row, but in general population.

THE COURT: Could I have the witness subpoena?

(Clerk hands paper to the Court)

THE COURT: I am filing the praecipe for

witness subpoena in the court file. We will take a ten minute recess, so that I can review these objections in my chambers. Take the defendant out, please.

WHEREUPON, the defendant was removed from the court room.

WHEREUPON, Court was in session following recess, defendant returned to the court room.

THE COURT: I have carefully reviewed the objections raised by the defendant, specifically the objections to the re-sentencing on the ground of venue and find that not to be a valid objection. The venue was changed to obtain a fair and impartial jury, and for that purpose only; there is no provision for the second objection as to witnesses being called to testify at this resentencing hearing. Also no provision for a jury to be empanelled, or

re-empanelled for this re-sentencing or for a subsequent or updated pre-sentence investigative report. Additionally, the last ground urged by the defendant with respect to the Florida Supreme Court not having a copy of the pre-sentence investigative report, I have a certificate which was filed by me, dated August 15, 1974, which certified to the Florida Supreme Court, pursuant to Rule 3.712(d), a copy of the pre-sentence investigative report. I am filing that with the Court so that it can be reviewed likewise on appeal, furnishing copies to the attorneys of record. I also have a second finding of fact, which I give to the State and to the defense, along with the certificate.

(The Court hands paper to the attorneys)

THE COURT: The second findings of fact very briefly recites that the defendant

was convicted of first degree murder by a duly empanelled jury and adjudicated guilty of that offense, that after the rendition by that jury a sentencing proceeding was held at which time the jury recommended the imposition of the death sentence. A pre-sentence investigative report was received by the Court, and a copy of that report, in its entirety, was at that time, furnished to both the State and the defense prior to the original sentencing. The filing of the Finding of Fact and the imposition of the death sentence was made on February 28, 1974. The Florida Supreme Court remanded this case to this Court for resentencing only consistent with the opinion of the United States Supreme Court of Gardner vs. Florida, which was a March 22, 1977 case, arising also in Citrus County, and

proceeding consistent with that case, this Court finds that the only pre-sentence investigative report considered in arriving at the disposition made at the original sentence is the report which was received by it at the time of the original sentence, and a copy of that entire pre-sentence investigative report is also being filed. That the only pre-sentence investigative report which has been considered at the re-sentencing is this same pre-sentence investigative report, bearing date of February 27, 1974. I have carefully reviewed the entire report, and considered the evidence received and presented during the jury trial, and at the advisory hearings, and it is the opinion of the court that the same sentence that was originally handed down is consistent with the dictates mandate of Gardner vs.

Florida. Therefore the same sentence, and it is the sentence of this Court the defendant, having been asked as to if he has anything to say why sentence should not now be imposed, I will ask again if there is a reason?

MR. PIERCE: May it please the Court, in your ruling, you also ruling that the praecipe for witness subpoena should not be issued?

THE COURT: Yes, sir.

MR. CONIGLIO: Your Honor, the only additional thing to say would be the same thing I said before prior to the Court's announced ruling, and would restate our request for a pre-sentence investigative report, one that includes some personal background on this defendant, the report that the Court considered in 1974, February 27, and now announced is reconsidering

that report and only that report, contains no information on the defendant's background and the only thing--the report speaks for itself--is the three charges, none of which had any violence, and a statement from the District Supervisor, Mr. Dippolito, that he had no personal background and had not interviewed the defendant.

THE COURT: Saying nothing to preclude the imposition of the sentence, it is the judgment, order and sentence of the court that the defendant be electrocuted till dead in the manner specified by the laws of the State of Florida. It is further directed that the defendant be fingerprinted at this time.

MR. CONIGLIO: So that the record will be clear, in regard to my appointment, I was originally appointed and relieved and the

public defender's office was re-appointed for the purposes of the appeal, and the public defendener's office will undertake any subsequent appeals at this time. I was notified of this hearing and I came, I felt that came under the previous appointment but at this time, to make the record clear, I would like to be relieved.

THE COURT: Your Motion is hereby granted, to relieve you, any further responsibility. The court further directs that the public defender pursue the appropriate appeal as required by law and you are appointed for that purpose.

MR. PIERCE: May it please the court, does the court want an order for appointment for the Tenth Circuit for appeal purposes?

THE COURT: I believe that is the way. . .

WHEREUPON, fingerpints of the defendant were made in open court.

THE COURT: The defendant is remanded to the custody of the Sheriff of Citrus County for delivery, re-delivery, to the state prison.

THAT ENDED THE PROCEEDINGS.

CERTIFICATE

STATE OF FLORIDA

COUNTY OF SUMTER

I, Lois C. Davis, Official Court Reporter, do hereby certify that I was authorized to and did report stenographically the testimony in the case of

STATE OF FLORIDA vs. CARL RAY SONGER, a/k/a ROBERT BERRY

and the above and foregoing pages numbered one to eleven is a true and correct transcript of the said testimony and proceedings.

IN WITNESS WHEREOF, I set my hand this 13th day of September 1977.

[s] Lois C. Davis
Official Court Reporter
Fifth Judicial Circuit

EXCERPTS FROM STATE EVIDENTIARY HEARING
HELD JANUARY 25, 1985 IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA
BEFORE THE HONORABLE JOHN W. BOOTH

THE COURT: Well, I think the instructions as given did prohibit it to just those mitigating circumstances that were in the statute and read. (p. 59)

* * * * *

THE COURT: Well, there is several items that makes it very difficult for the Court to rule because as you have pointed out in your memorandum that in the evolution argument there has been a broadening of the matters that can be presented to a jury during the second phase. At one time when the law was first passed it was strictly limited

to the statutory circumstances which were spelled out, and did not include certain items which have since been included by the statute. At that time, as you are aware, Mr. Babb, it was restricted to just certain enumerated items. Since then the Florida Legislature has included other items that were not included in the law that was in effect in 1974. So you are attempting to go into matters that may be included by subsequent laws passed by the Legislature or subsequent case law that has modified or made it broader. I'm attempting to give you as much latitude to bring in any

testimony that you feel is appropriate.

MR. BABB: I understand that, Judge, and I appreciate you laboring . . .

THE COURT: But I think that there is a lot of case law that has been handed down that has changed the law, as Mr. Coniglio stated on the stand, since the trial. So it's difficult, unless you want . . . It's difficult for the Court to make a ruling on any objections unless you can show what the law is now and whether it applied at the time of the trial. (p. 63 - 64)

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-567

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

CARL RAY SONGER.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit En Banc

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the Court of Appeals err in reaching the merits of Mr. Songer's second habeas corpus appeal when it concluded that it would serve the interests of justice to do so and the district court was sufficiently unsure of its decision to dismiss that it granted a certificate of probable cause to appeal?

Should the Court of Appeals ignore the findings and the record statements of the presiding state court judge, admitting constitutional error, in determining whether the sentencing proceeding over which he presided comported with the Constitution?

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IN THE

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No. 85-567

LOUIE L. WAINWRIGHT, Secretary,
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vs.

CARL RAY SONGER.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit En Banc

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Carl Ray Songer, challenged the constitutionality of his death sentence in habeas corpus proceedings. Upon review of his second habeas petition and largely on the basis of findings by the trial court essentially admitting constitutional error, the court of appeals en banc unanimously granted respondent relief from sentence. The State of Florida seeks certiorari review of the appellate court's two-page, per curiam opinion. Respondent urges the Court to deny the State's petition.

CITATION TO OPINIONS BELOW

The August 16, 1985 per curiam judgment of the United States Court of Appeals for the Eleventh Circuit En Banc, granting respondent a retrial on sentencing, is the basis of the State's petition. The court's opnion is reported as Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc) (per curiam).

The order of the district court dismissing the petition but granting a certificate of probable cause to appeal is not reported. Songer v. Wainwright, No. 85-14-Civ-Oc-12 (M.D. Fla. Feb. 2, 1985). It appears at page 63 of the State's "Appendix of Petitioner on Jurisdiction."

JURISDICTION

The opinion of the court of appeals was issued on August 16, 1985. No request for rehearing was filed. The jurisdiction of the Court to grant certiorari to review this case has been invoked under 28 U.S.C. §§ 1254(1), 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

With due respect to the State, the petition involves no constitutional provision.

The petition involves Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides as follows:

> A second or successive petition [for a writ of habeas coprus] may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

Since the State presents a largely "procedural" question, its statement of the case consists primarily of a recitation of the various citations to decisions rendered in this case over the course of its long procedural history. Respondent believes, however, that some description of the substance of those deci-

sions and the situation which they concern would be useful to the Court in assessing whether this case is suitable for review on certiorari of the issues presented by the State.

A. Statement of Facts

Respondent, Carl Ray Songer, was convicted and sentenced to death for the murder of Ronald Smith, a Florida Highway Patrolman. The constitutionality of his penalty trial is the subject of his second habeas corpus petition, and the facts involved are not in dispute.

Florida had enacted a death sentencing statute shortly before respondent was tried in 1974. That statute specifically identified the aggravating and mitigating factors that the sentencer was permitted to consider. See State v. Songer, No. 74-49 CF (Fla. Cir. Ct. Jan. 27, 1985) (appendix reproduces former statute) (A-94).[1] Respondent's was the first capital sentencing trial to occur under the new law in Florida's Ninth and Fifth Judicial Circuits. It was the first experience with such bifurcated proceedings for defense counsel, the prosecutors and the trial judge.

As a result of his study of the statute and discussions with the trial court and the State, defense counsel concluded that his presentation of mitigating evidence was limited to that relevant to those factors enumerated in the statute. Consequently, defense counsel decided not to develop substantial, available mitigating evidence in the form of good-character testimony from

[1] The reference is to the trial court's order on respondent's second state court motion for post-conviction relief, reproduced in the State's appendix at A-94. It was in this order that the trial court in essence found as a factual matter that respondent's sentencing trial had been unconstitutionally narrow, but denied relief on the legal ground that Lockett v. Ohio, 438 U.S. 586 (1978), did not apply retroactively to trials occurring before the date Lockett was decided. See State v. Songer, slip op. at 6 (A108-9).

respondent's parents, former teachers, clergy, employers and friends. Nor did counsel investigate or present an existing Texas parole report which described respondent's temperament as nonviolent, even passive, and his prospects for rehabilitation as excellent. Even the nonstatutory factors which inadvertently found their way into the record -- for example, information that respondent was married with a young son, that he was a brick-mason, that he was hoping to settle his family in Florida -- were unaddressed: defense counsel waived closing argument, as did the prosecutor. The entire penalty phase -- the sum total of time during which the jury was called upon to focus its attention on the respondent as an individual in advance of deciding whether he should live or die -- lasted about a half hour. The reading of the court's instructions took about 2 minutes.

The court's instructions were less than thirteen lines long.[2] The court instructed the jury that a decision to vote for life must be "based upon ... whether sufficient mitigating

---

[2] The trial court's sentencing instructions, in their entirety, were as follows:

> Under these procedures, it is now your duty to determine, by majority vote, whether or not you advise the imposition of the death penalty based upon:
>
> One, whether sufficient aggravating circumstances as hereinafter enumerated, exist.
>
> Two, whether sufficient mitigating circumstances exist, as hereinafter enumerated, which outweigh the aggravating circumstances found to exist, and
>
> Three, based on these considerations, whether the defendant should be sentenced to life or death.

These instructions did not use the precise language of the statute. The statute was changed after Lockett expressly to allow all mitigating circumstances into evidence. Now, of course, Florida practice is to use standard jury instructions, which are some five or six pages long. Those instructions make explicit the demands of Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982).

circumstances exist, as hereinafter enumerated." The court then told the jury that "mitigating circumstances by statute are" those listed in the statute, whereupon the trial court recited the statutory list. Even the verdict form on which the jury was required to indicate its decision emphasized the limitations on the jury's consideration of sentence: the form stated that the jury had considered only "mitigating circumstances as defined in the Court's charge." At no point did the court advise the jury that it could give weight and meaning to its impressions of the character and background of the respondent, and that ultimately its decision was whether a death sentence, considering the totality of the circumstances, was appropriate.

At respondent's second state post-conviction hearing, the trial court itself acknowledged that the sentencing instructions were limiting: "Well, I think the instructions as given did prohibit it [the jury] to just those mitigating circumstances that were in the statute and read." The court also explained why it deemed that limitation appropriate in 1974:

> [W]hen the law war first passed it was strictly limited to the statutory circumstances which were spelled out, and did not include certain items which have since been included by the statute. At that time ... it was restricted to just certain enumerated items.

Thus, the record before the court below demonstrated for the first time that the trial court's admitted intent at respondent's sentencing trial was to preclude the jury from considering any other aspects of the man before them than those few specifically noted in the statute. Moreover, the trial court, which is the ultimate sentencer in Florida, limited its own consideration of sentence to a mechanical weighing of statutory factors; that is what the court believed the statute required.

In January of this year, evidence was discovered which proved the prejudice ordinarily presumed from a Lockett/Eddings violation. A juror who served at respondent's sentencing trial came forward to say that the jury struggled over its sentencing decision and ultimately voted to recommend death only because it felt constrained to do so by the court's charge, and because it placed its collective oath above its collective instinct. Moreover, the juror testified at the second state post-conviction hearing that, had the court instructed that the jury could go beyond the factors listed in the statute, the nonstatutory mitigating evidence now known would have produced a recommendation for life.

B. Course of Proceedings Since Trial

Respondent's original sentence was affirmed by the Supreme Court of Florida on September 22, 1975. Songer v. State, 322 So.2d 481 (Fla. 1975) ("relating the statutorily enumerated mitigating circumstances to the instant case") (emphasis added). No petition for rehearing was filed. This Court granted a petition for certiorari, vacated the sentence, and remanded for resentencing in accordance with Gardner v. Florida, 430 U.S. 349 (1977). Songer v. Florida, 430 U.S. 952 (1977).

At the resentencing hearing, defense counsel moved to impanel a new jury. He also requested a new Pre-Sentencing Investigation report to include information about respondent's background and character, since the prior PSI had been limited to that about his prior criminal record. Respondent himself moved pro se to present character evidence. The trial court denied the motions, and immediately handed counsel an order, prepared in advance of the hearing, reimposing the death sentence on grounds identical to those originally relied upon.

On September 7, 1978, the death sentence was again affirmed in the Florida high court. Songer v. State, 365 So.2d 696 (Fla. 1978). Rehearing was denied with an opinion on December 21, 1978. It was in that opinion that the Florida Supreme Court first addressed the implications of Lockett v. Ohio, 438 U.S. 586 (1978), which had been decided while respondent's appeal was sub judice. However, the court overlooked the significance of Lockett to respondent's case, holding that the statute was on its face constitutionally sound, but saying nothing about what standard was actually applied when respondent was tried. Songer v. State, 365 So.2d 700 (Fla. 1978).

On September 24, 1980, respondent filed a Motion to Vacate Judgment and Sentence, pursuant to Fla. R. Crim. P. 3.850, raising several claims as violations of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. On September 30, 1980, after a limited evidentiary hearing, the trial court denied the motion. The Florida Supreme Court affirmed on September 9, 1982. Songer v. State, 419 So.2d 1044 (Fla. 1982). Rehearing was denied on October 29, 1982.

A state petition for writ of habeas corpus alleging ineffectiveness of appellate counsel was filed in the Florida Supreme Court on November 22, 1982 and denied on December 1, 1982. Songer v. State, 423 So.2d 355 (Fla. 1982).

Repondent first came to the federal courts on December 1, 1982, with a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Ocala Division. After an evidentiary hearing, the district court denied the petition on July 14, 1983. Songer v. Wainwright, 571 F. Supp. 1384 (M.D. Fla. 1983) (Melton, J.). The district court dealt with respondent's Lockett/Eddings claim as part of its effective assistance of counsel analysis, acknowledging that counsel's failure to introduce nonstatutory mitigating evidence

was the product of a reasonable mistake. Id. at 1395. Having established that trial counsel was not at fault, however, the court was silent on the continuing significance of Lockett. The district court did not then address the fact, regardless of the matter of fault, that respondent simply did not have a sentencing hearing of the scope contemplated by the Eighth Amendment. On appeal from the denial of habeas relief, the court of appeals affirmed on May 18, 1984. Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984). The panel did not address the Lockett/Eddings issue. Rehearing and rehearing en banc were denied on June 26, 1984.

Respondent then sought review in this Court by petition for writ of certiorari. The Court denied the petition on January 7, 1985, with a dissenting opinion by Justices Brennan and Marshall. Songer v. Wainwright, ____ U.S. ____, 83 L.Ed.2d 809 (1985). That dissent represents the first time in the long history of this litigation that any judge had squarely addressed the implications under Lockett and Eddings of respondent's sentencing trial in view of the fact that all of the participants operated under the assumption that evidence of respondent's character and background could not and would not be admitted in mitigation of a death sentence.[3]

[3] Only a few days after this Court denied respondent's petition for certiorari, the court of appeals ordered rehearing en banc in Hitchcock v. Wainwright, 745 F.2d 1348 (11th Cir. 1985), vacating 745 F.2d 1332 (11th Cir. 1984). On the understanding that the court of appeals would deal in Hitchcock with the applicability of Lockett and Eddings to a set of similar circumstances, respondent filed a motion in the court of appeals to recall its mandate pending Hitchcock. The motion was denied on January 29, 1985. Songer v. Wainwright, 755 F.2d 1394 (11th Cir. 1985). Panel rehearing was denied on February 1, 1985, with an amendment to the prior order. Songer v. Wainwright, 755 F.2d 1395 (11th Cir. 1985). The en banc court of appeals vacated that decision four days later. Songer v. Wainwright, 756 F.2d 799 (11th Cir. 1985) (en banc). See note 6, infra.

On January 24, 1985, respondent filed a second motion to vacate sentence in the trial court. After a hearing on January 25, the trial court entered an order on January 27, implicitly finding that nonstatutory mitigating evidence had been precluded from respondent's sentencing hearing because of a narrow understanding and application of Florida's sentencing statute by every participant at the trial. State v. Songer, No. 74-49 CF, slip. op. at 5-6 (A-105-09). But the court denied relief on the sole legal ground that Lockett does not apply retroactively. Id. (A-108-09). The Florida Supreme Court affirmed the denial of relief on January 31, 1985. Songer v. State, 463 So.2d 229 (Fla. 1985). A petition for certiorari on the question whether Lockett v. Ohio is retroactive was filed on the same day, and denied by this Court on June 10, 1985. Songer v. Florida, ____ U.S. ____, 86 L.Ed.2d 728 (1985).

Also on January 31, 1985, respondent brought his claims to the federal district court in a second petition for a writ of habeas corpus. The court heard oral argument on February 1, at which petitioner and respondent argued their positions with respect to the court's discretion to redetermine the merits of the successive petition. See Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts. The parties stipulated to the admission in evidence of the transcript of the January 25, 1985 trial court hearing.[4]

In an order entered on February 2, 1985, the district court dismissed the petition on the ground that "the ends of justice would not be served by a redetermination of the issues raised," Songer v. Wainwright, No. 85-14-Civ-Oc-12, slip op. at 13 (M.D.

[4] Respondent would note that the facts adduced at that hearing are uncontroverted. The State waived cross-examination of every witness and offered no evidence in rebuttal whatsoever.

Fla. Feb. 2, 1985) (Melton, J.) (A-83). The district court concluded that respondent's case was not similar enough to one of three examples from Supreme Court and Eleventh Circuit cases where redetermination of constitutional issues had been deemed to serve the ends of justice. Slip op. at 7-13 (A-74-83). However, the district court issued a certificate of probable cause to appeal (A-84-85); thus, the court of appeals was bound to reach the merits of respondent's claims. Barefoot v. Estelle, ____ U.S. ____, 77 L.Ed.2d 1090, 1104 (1983). On February 5, the day after oral argument, the panel expressed its view that the merits of respondent's claims "should be heard by the court en banc along with Hitchcock v. Wainwright," the case the court had earlier ordered reheard en banc and that respondent had all along maintained was closely related. Songer v. Wainwright, 756 F.2d 800 (11th Cir. 1985). The court explained that:

> In general we are not able to predict the exact contours of any en banc decision that may be rendered in Hitchcock on the Lockett issue in the case, and the extent, if any, to which this issue might affect this case. Nor can we, as a panel of the court, properly attempt to decide or limit what the court may decide in Hitchcock. Without knowing the parameters of Hitchcock, we cannot say with assurance what, if any, issues in this case may fall outside of Hitchcock.

Id. at 801.[5] On March 20, 1985, the court of appeals voted to hear respondent's appeal en banc.[6] Songer v. Wainwright, 756 F.2d 1482 (11th Cir. 1985) (en banc).

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[5] The court granted a stay until the full court could vote whether to hear this case with Hitchcock. This Court denied the State's application to vacate the lower court's stay. Wainwright v. Songer, ____ U.S. ____, 84 L.Ed.2d 308 (1985). The State sought the Court's reconsideration of that action by means of a petition for certiorari before judgment. The Court denied that petition on June 10, 1985. Wainwright v. Songer, ____ U.S. ____, 86 L.Ed.2d 727 (1985).

[6] On April 9, 1985, the en banc court vacated its opinion and judgment on the original appeal and consolidated that appeal for rehearing en banc with the second appeal. Songer v. Wainwright, 758 F.2d 533 (11th Cir. 1985) (en banc), vacating 733 F.2d 788

The decision of the en banc court of appeals was rendered on August 16, 1985; in a brief, per curiam opinion the court unanimously vacated the judgment of the district court. In the court of appeals' view, the "statements ... [of the trial judge during the January 1985 hearing in state court] indicating that he interpreted Florida Statute § 921.141[7] at the time of [respondent's] trial as limiting consideration of mitigating evidence to those 'enumerated items'" and that "he thus did not give consideration to any evidence dealing with nonstatutory mitigation," id. (emphasis in original), demonstrated "new and different grounds for relief ... that [respondent] could not have presented" in his first habeas corpus proceeding. The court concluded that "it is clear that the state sentencing judge refused to give any consideration to nonstatutory mitigating evidence at ether the first or second sentencing proceedings. The interests of justice require that this be corrected." Id. (emphasis added).[7]

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DENY CERTIORARI BECAUSE THE COURT OF APPEALS APPLIED THE CORRECT STANDARD FOR CONSIDERING SUCCESSIVE HABEAS CORPUS APPEALS UNDER SANDERS V. UNITED STATES AND RULE 9(b)

Petitioner and respondent do not differ on the legal standard to be applied in cases like this in which a state

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(11th Cir. 1984). On August 16, the en banc court reinstated the panel opinion. Songer v. Wainwright, 769 F.2d 1497 (11th Cir. 1985) (en banc) (per curiam).

[7] The court of appeals left to the trial judge's discretion the decision on whether to impanel a jury for the resentencing hearing. Songer v. Wainwright, 769 F.2d 1488, 1489-90 n.1 (11th Cir. 1985) (en banc). Four members of the court believed that the respondent was constitutionally entitled to a new jury on resentencing. Id. at 1490-96. This view is partly the basis of the respondent's cross-petition for certiorari, also filed today.

prisoner petitions the federal courts for redetermination of issues that have once been determined adversely. As the Court stated unequivocally in Sanders v. United States, 373 U.S. 1 (1963),

> Controlling weight may be given to denial of a prior application for federal habeas corpus ... only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

373 U.S. at 15 (emphasis added). See Petition for Certiorari at 15-16.

Congress itself has recognized that state prisoners have a right to bring to the federal courts, in certain circumstances, issues arising under the federal Constitution which challenge the integrity of a state court judgment. 28 U.S.C. §§ 2244(a), 2254. Section 2244(a), Rule 9(b) of the Rules Governing Section 2254 Cases In The United States District Courts, and the Advisory Committee Notes explaining the rule plainly contemplate that state prisoners will sometimes be able to relitigate their cases in the federal courts, even where the same issues are presented again. On the wisdom of Sanders v. United States, Rule 9 permits a federal court to revisit issues previously resolved on the merits if doing so would serve the ends of justice.[8]

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[8] Moreover, in this case the State overlooks the significance of the district court's decision to grant a certificate of probable cause. 28 U.S.C. § 2253. As this Court has stated:

> When a certificate of probable cause is issued by the district court, ... petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal. Accordingly, a circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of the appeal....

New, specific and presumptively correct state court fact findings show that respondent presented that "rare instance," Rule 9(b) advisory committee note, where reconsideration of a claim served the ends of justice. The State does not dispute the fact that respondent's sentencing hearing was not of the scope required by Lockett and Eddings. Nor does the State dispute that the limited scope was produced by an unconstitutionally narrow understanding and application of the Florida sentencing statute by the trial judge.[9] Faced with these uncontroverted, presumptively correct facts, the court of appeals held that "it is clear that the state sentencing judge refused to give any consideration to nonstatutory mitigating evdence at either the first or second sentencing proceedings. The interests of justice require that this be corrected." Songer v. Wainwright, 769 F.2d at 1489. This is precisely the approach authorized by law.

The essence of the State's petition is that the court of appeals erred, not by using an incorrect standard, but in applying the well-established one. Citing Pullman-Standard v. Swint, 456 U.S. 273 (1982), the State maintains that a conclusion on whether the ends of justice are served is a finding of fact. Petition for Certiorari at 16-17. Thus, in the State's view, once the district court "concluded that the ends of justice would not be served by a redetermination of the issues raised" (A-83), all that remained for the court of appeals was to affirm the district court's denial of relief -- unless the conclusion on

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Barefoot v. Estelle, ____ U.S. ____, 77 L.Ed.2d 1090, 1104 (1983) (emphasis supplied). The court below fully understood the demands placed upon it by the certificate of probable cause to reach and resolve the merits of respondent's appeal. It also appreciated the problems in doing so while similar issues are pending and unresolved before the court en banc. As the court explained, the pendency of Hitchcock en banc simply made prior, summary disposition of the merits of respondent's case imprudent. See Songer v. Wainwright, 756 F.2d 800, 801 (11th Cir. 1985).

[9] Indeed: in January of this year, the trial judge so found. See 28 U.S.C. § 2254(d).

"the ends of justice" is clearly erroneous. However, it ignores both law and common sense to deem "the ends of justice" a "pure question of fact," see Pullman-Standard v. Swint, 456 U.S. at 288. Congress and this Court set standards of law, and the "ends of justice" is precisely such a legal standard. The court below applied this standard to a set of uncontroverted facts and correctly determined that respondent was entitled to relief.

The State makes special note of the court of appeals's statement that "the record does establish new and different grounds for relief ... that [respondent] could not have presented" previously, Songer v. Wainwright, 769 F.2d at 1489. See Petition for Certiorari at 17. The State then argues that at most the instant proceedings involve additional facts, and therefore that the en banc court's decision conflicts with two of the Circuit's panels which have held that relief should not be granted on second petitions that merely allege additional facts. See Shriner v. Wainwright, 735 F.2d 1236 (11th Cir. 1984); Smith v. Kemp, 715 F.2d 1459 (11th Cir. 1983). Again, the State overstates the disposition of this case below.

First, the "new and different grounds" language notwithstanding, it is clear that the court reached its judgment correctly under Rule 9(b) by concluding that "[t]he interests of justice require that [respondent's unconstitutional sentencing trial] be corrected." Songer, 769 F.2d at 1489. Second, the fact that panels of the Eleventh Circuit declined to revisit the merits of issues in Shriner and Smith, while the entire Circuit felt compelled to do so here, proves nothing more than that the significance of new facts depends on the circumstances of a particular case; in each case, the court acknowledged that it had discretion to revisit the merits of cases where the ends of justice warrant. Songer v. Wainwright, 769 F.2d at 1489; Shriner v. Wainwright, 735 F.2d at 1239-40; Smith v. Kemp, 715 F.2d at

1468. Whether new facts warrant reconsideration of the merits is a question of judgment, guided by allegiance to the ends of justice, necessarily dependent on the contours of each case. Here, the court was faced with patent, undisputed constitutional error and findings of the state court owning up to it. In essence, the court unanimously concluded that the ends of justice are served by denying the State the opportunity to take respondent's life when every relevant actor effectively agreed that the sentencing hearing violated Lockett and Eddings.

The State's petition should be denied.

II.

THE COURT SHOULD DENY CERTIORARI BECAUSE THE STATE HAS WAIVED ANY OBJECTION TO THE COURT'S CONSIDERATION OF THE TRIAL COURT'S RECORD ADMISSIONS OF CONSTITUTIONAL ERROR BY FAILING TO RAISE THE QUESTION AT ANY TIME BEFORE THE INSTANT PETITION AND, MOREOVER, BECAUSE THE STATEMENTS COMPLAINED OF ARE REFLECTED IN THE TRIAL COURT'S PRESUMPTIVELY CORRECT FINDINGS

In accordance with Florida practice, the judge who presided at respondent's trial also presided at his state post-conviction hearing. On the record at that hearing in January, the trial court made statements conclusively demonstrating that, in violation of Eddings, he had failed to consider any factor in mitigation of a death sentence that was not contained in the statutory list. (Some of the court's statements are reproduced in the State's appendix at A-254). Thereafter, the judge made findings indicating he had limited consideration of mitigating circumstances at the time of respondent's trial in violation of Lockett; yet the court denied relief on the ground that Lockett has not been held retroactive. (A-106-09). For the first time in

the history of this case, the State challenges the propriety of considering these facts. Two reasons demand prompt denial of certiorari on this point.

First, the State's objection is new. In the district court, before the appellate panel, before the en banc court of appeals, and even in its petition to this Court, the State argued that, even considering the judge's statements and findings, respondent's habeas appeal was meritless simply because successive. Only now does the State suggest that the trial court's record admissions cannot be considered. The argument was never presented to the court below; there is therefore nothing for the Court's review.

Second, the State's objection is unfounded. Fayerweather v. Ritch, 195 U.S. 276 (1904), and its progeny disfavor calling judges to testify. Underlying the decision is concern for the risk of judges being summoned by litigants to explain their mental processes in further depth than they have in an order or opinion. Here, the trial court was never summoned, never called as a witness, never asked a question. Indeed, the proceedings at which he made his statements were before him only because Florida practice required it. The trial judge volunteered his observations from the bench. More importantly, he made findings of fact, presumptively correct under 28 U.S.C. § 2254(d), on the basis of those observations. To adopt the State's position, and ignore the trial court's candor, would be to extend Fayerweather into the nether world.

CONCLUSION

For the foregoing reasons, the State's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 30, 1985.